TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 305.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

PATRICK HENRY WINSTON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JULY 26, 1898.

(16944.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 205.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

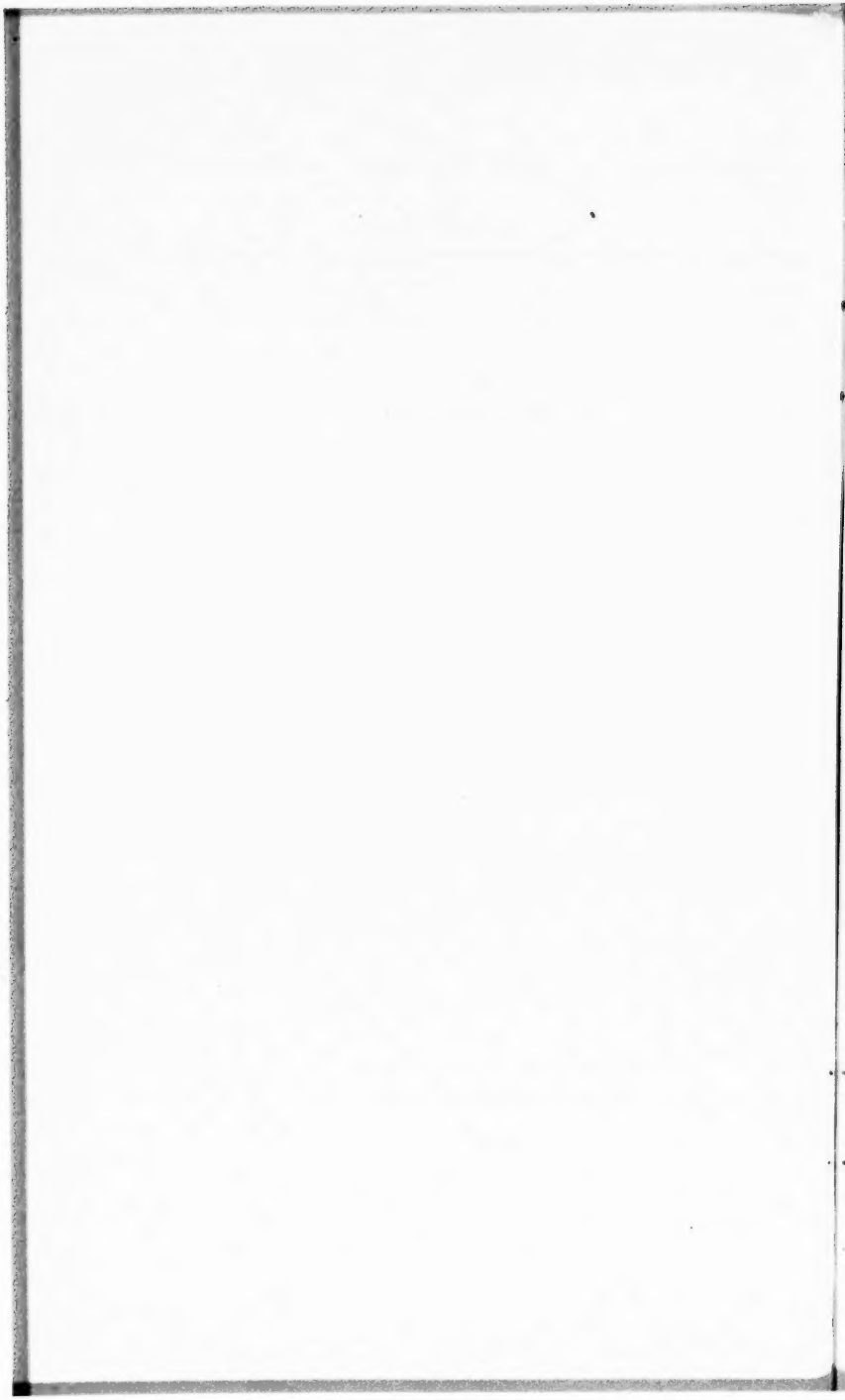
PATRICK HENRY WINSTON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a [No. 227. United States circuit court of appeals for the ninth circuit. The United States, plaintiffs in error, vs. Patrick Henry Winston. Transcript of record. In error to the United States circuit court for the district of Washington. Filed May 18, 1895.]

1 In the circuit court of the United States for the district of Washington, eastern division. April term, 1894.

Be it remembered that on the 13th day of February, 1894, there was duly filed in said circuit court of the United States for the district of Washington, eastern division, a complaint in words and figures as follows, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT.

Complaint.

The plaintiff, for a first cause of action against the defendant, complains and alleges as follows:

1st. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

2nd. That he is now and was during all of said time a resident of the city of Spokane, county of Spokane, and State of Washington.

3rd. That during said term of office, to wit, about the month
2 of April, 1890, the plaintiff, at the request of and by the direction of, the defendant, appeared as attorney for one John M. Gibbon, an officer of the United States, in a case instituted in the courts of the Territory of Washington, and transferred thence to the court of the United States, wherein the Catholic Bishop of Nesqually was plaintiff and the said John M. Gibbon defendant, which case involved the title of the United to about four hundred and fifty (450) acres of land, with the improvements thereon, known as the Vancouver Military Reservation, said land and improvements being of the value of two hundred and fifty thousand ($250,000) dollars, and as such attorney conducted the trial of said case in the circuit court of the United States to its conclusion therein.

4th. That the value of the services rendered by the plaintiff in said case are not fixed by the statutes of defendant, but were reasonably worth the sum of five thousand ($5,000) dollars, of which sum defendant paid plaintiff the sum of two thousand five hundred ($2,500) dollars, leaving a balance due and unpaid to plaintiff by defendant of the sum of two thousand five hundred ($2,500) dollars.

5th. That thereafter, and before the bringing of this suit, plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

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SECOND.

And for a second cause of action plaintiff alleges:

1st. That he is a resident of the city of Spokane, county of Spokane, and State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th
3 day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

3rd. That during his said term of office, to wit, about the month of April, 1892, plaintiff, at the request of defendant, appeared in the circuit court of appeals, ninth judicial circuit, at San Francisco, in a case wherein the defendant above named was appellee and the steam tug "Pilot" was appellant, and as such attorney conducted the trial of said case to its conclusion.

4th. That the value of the services rendered by plaintiff, in said case are not fixed by the statutes of defendant, but were reasonably worth the sum of five hundred dollars, of which sum the defendant has paid plaintiff the sum of two hundred and twelve and 79–100 dollars, leaving due and unpaid by defendant to plaintiff the balance, amounting to two hundred and eighty-seven and 21–100 dollars.

5th. That thereafter, and before the bringing of this suit, plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

THIRD.

And for the third cause of action plaintiff alleges:

1st. That he is a resident of the city of Spokane, county of Spokane, and State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

4 3rd. That during his said term of office, to wit, about the month of April, 1892, plaintiff, at the request of defendant, appeared in the circuit court of appeals, ninth judicial circuit, at San Francisco, in a case wherein one Dunsmer was appellant, and one Bradshaw, an ex-collector of customs, for the defendant for the district of Puget Sound, was appellee, said case having been instituted against said Bradshaw for acts committed by him in the lawful discharge of his duty as collector aforesaid, and as such attorney conducted the trial of said case to its conclusion.

4th. That the value of plaintiff's services in said case are not fixed by the statutes of defendant, but were reasonably worth the sum of five hundred ($500) dollars, no part of which has been paid.

5th. That thereafter and before the bringing of this suit plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

FOURTH.

And for a fourth cause of action plaintiff alleges:

1st. That he is a resident of the city of Spokane, county of Spokane, and State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

3d. That during his said term of office, to wit, about the month
5 of April, 1892, plaintiff, at the request of defendant, appeared in the circuit court of appeals, ninth judicial circuit, at San Francisco, in a case wherein the defendant was appellant and one Gee Lee was appellee, and as such attorney conducted the trial of said case to its conclusion.

4th. That the value of the services rendered by plaintiff in said case are not fixed by the statutes of defendant, but were reasonably worth the sum of two hundred and fifty dollars, no part of which has been paid.

5th. That thereafter and before the bringing of this suit plaintiff demanded payment of the same from defendant, but that defendant has not paid the same and refuses to pay the same.

FIFTH.

And as a fifth cause of action plaintiff alleges:

1st. That he is a resident of the city of Spokane, county of Spokane, and State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

3rd. That during his said term of office, to wit, about the month of March, 1893, plaintiff, at the request of defendant, appeared in a case instituted in the superior court of the State of Washington and afterwards removed to the courts of the United States, and also appeared in another case instituted in the circuit court of the United States for the district of Washington, northern division, both of said cases
6 involving the right of the United States to the lands known as the Puyallup Indian Reservation, and its authority over the same and over the Indians occupying the same, and both of said cases being instituted against one Edwin Eels and other officers of the United States by one Frank C. Ross and certain Indians; and that as such attorney he conducted the trial of the said cases to their conclusion, in said courts; that said services were begun while plaintiff was the legally appointed and duly commissioned and qualified attorney for the defendant, but were continued and concluded after his successor in office was appointed and qualified, with the consent and knowledge of defendant.

4th. That the value of the said services are not fixed by the statutes of defendant, but were reasonably worth the sum of one thousand and five hundred dollars ($1,500), no part of which has been paid.

5th. That thereafter and before the bringing of this suit plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

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SIXTH.

And for a sixth cause of action plaintiff alleges:

1st. That he is a resident of the city of Spokane, county of Spokane, and State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

7 3rd. That during his said term of office, to wit, from the first day of January, 1893, to the thirteenth day of May, 1893, the plaintiff became entitled to receive from defendant the sum of four thousand six hundred and twenty-two and 19–100 ($4,622.19) dollars, as compensation for fees fixed by statute, salary, disbursements for clerk hire and office expenses, for necessary attendance upon the courts of the United States, and upon examinations before United States judges and commissioners, and for traveling from his place of abode to the place of holding said courts or to the place of said examinations; that of said sum defendant has paid plaintiff the sum of three thousand two hundred and forty-two and 35–100 ($3,242.35) dollars, leaving a balance due and unpaid of one thousand three hundred and seventy-nine and 84–100 dollars; that this balance, all of which is due plaintiff as compensation for traveling from his place of abode to said courts and places of examination, defendant has required plaintiff to include in his semiannual return for his personal compensation and refuses to pay the same, although requested so to do prior to the bringing of this suit.

Wherefor' plaintiff prays judgment against defendant for the sum of six thousand four hundred and seventeen and 5–100 dollars ($6,417.05) and for his costs and disbursements in this action.

ALEX. M. WINSTON,
Attorney for Plaintiff.

8 STATE OF WASHINGTON,
County of Spokane, ss:

Before me personally appeared Patrick Henry Winston, the plaintiff in the above-entitled action, who being first duly sworn, deposes and says that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

PATRICK HENRY WINSTON.

Subscribed and sworn to before me this 8th day of February, 1894.

[NOTARIAL SEAL.] J. W. DOUGLAS,
Notary Public in and for the State of Washington, Residing in Spokane, Washington.

J. W. Douglas, notary public, State of Washington, commission expires March 14th, 1894.

Due service of the within complaint accepted this 12th day of February, 1894.

WM. H. BRINKER,
U. S. Attorney and Attorney for Defendant.

(Endorsement:) No. 225. In U. S. circuit court, 9th circuit, eastern division. Patrick Henry Winston, plff., vs. The United States, deft.

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Complaint and petition. Filed Feb'y 13, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 5th day of April, 1894, there was duly filed in said court, in said cause, an affidavit in the words and figures as follows, to wit:

9 In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,)
vs.
THE UNITED STATES, DEFENDANT.)

Affidavit of service of complaint.

Before me personally appeared Alex. M. Winston, who, being first duly sworn, upon oath deposes and says that he is the attorney of record for the plaintiff in the above-entitled action; that on the 7th day of February, 1894, at the city of Spokane, State of Washington, he sent by registered mail to the Attorney-General of the United States a copy of the original complaint in the above-entitled action, duly certified to be such copy by himself as said attorney, and that thereafter he received in return the card which is attached to this affidavit and made a part thereof, which said card contains a receipt for such letter and complaint, said receipt being signed by the duly authorized agent of the Attorney-General in the premises.

ALEX. M. WINSTON.

Sworn and subscribed to before me this 5th day of April, 1894.

A. REEVES AYRES,
Clerk U. S. Circuit Court.

When the registered letter or parcel accompanying this card is
10 delivered the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $300 is fixed by law for using this card for other than official business.

Post-Office Department.)
Official business.)
Post-office at .)

Stamp here name of post-office, Washington, D. C., Feb. 17 1894, and date of delivery.

Return to
Name of sender, Winston & Winston.
Street and number, or post-office box.....
Post-office at Spokane, county of Spokane, State of Washington.

Registry return receipt sent Feb. 7, 1894. 189.
Reg. No. 1102.

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From post-office at Spokane, Wash.

‡Reg. letter. } Addressed to Atty. General, U. S.
Reg. parcel. } Post-office at Washington, D. C.

After obtaining receipt below, the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above-described registered { ‡Letter. / ‡Parcel.

(Sender's name one other side.)

11 Sign on dotted lines to the right.
When delivery is made to other than addressed, the names of both addressee and recipient must appear.

R. Olney, J. J. Haney. 3174.

‡ Erase letter or parcel, according to which is sent.

(Endorsement on affidavit:) In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division. Patrick Henry Winston, plaintiff, vs. The United States, defendant. Affidavit of Alex. M. Winston. Filed April 5, 1894. A. Reeves Ayres, clerk. Alex. M. Winston, Spokane, Wash., attorney for plaintiff.

And afterwards, to wit, on the 6th day of April, 1894, there was duly filed in said court, in said cause, an answer in the words and figures as follows, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF, }
vs.
THE UNITED STATES, DEFENDANT. }

Answer.

Now comes the defendants, by William H. Brinker, their attorney, and for answer to the complaint of plaintiff, and the several causes of action therein stated, say:

12 I. That they admit that the plaintiff, on the several days stated in said complaint, was the lawfully appointed, commissioned, and qualified attorney of the United States for the district of Washington, and that he does now, and at all of said time did, reside in the city of Spokane, in the State of Washington.

Admit that during his incumbency of the office of United States attorney for the district of Washington, by direction of the defendants, said plaintiff appeared as attorney for one John M. Gibbon, an officer of the United States, in a case instituted in the courts of the Territory of Washington, and afterwards transferred to the United States court in the district of

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Washington, wherein the Catholic bishop of Nesqually was plaintiff and the said John M. Gibbon defendant, which case involved the title to the land known as the Vancouver Military Reservation, about the month of April, 1890. But defendants deny that they have any knowledge or information sufficient to form a belief as to whether the said land and improvements were of the value of two hundred and fifty dollars or not.

II. That they deny that the value of the services rendered by plaintiff in said case are not fixed by statute of the United States, and deny that they were reasonably worth the sum of five thousand dollars, or any other sum, except such sum as is provided by law. They admit that they paid to the plaintiff the sum of twenty-five hundred dollars, but they deny that such payment left a balance due and unpaid to
13 plaintiff of the sum of twenty-five hundred dollars, or any other sum whatever.

SECOND.

Defendants, for answer to the second cause of action in said complaint, say:

I. That they admit the facts stated in paragraphs one and two of said complaint, and also that during plaintiff's term of office, about the month of April, 1892, plaintiff, at the request of defendants, appeared in the circuit court of appeals, for the ninth judicial circuit at San Francisco, in a case wherein the defendants were appellees and the steam tug "Pilot" was appellant. But they deny that the value of the services rendered by the plaintiff in said cause are not fixed by the statutes of the United States, and deny that the said services were reasonably worth the sum of five hundred dollars, or any other sum, except such as is provided by law. That they admit that they have paid the plaintiff the sum of two hundred and twelve dollars and seventy-nine cents, but they deny that there is left due and unpaid to plaintiff, from defendants, a balance amounting to two hundred and eighty-seven dollars and twenty-one cents, or any other sum whatever. They deny that the said alleged balance has ever been demanded of them by plaintiff.

THIRD.

For answer to the third cause of action in said complaint, defendants say:

14 I. That they admit the facts stated in paragraphs one and two thereof, and also admit that plaintiff, about the month of April, 1892, at the request of defendants, appeared in the circuit court of appeals in the cause in paragraph three of said third cause of action mentioned, as the attorney for the appellee therein, and conducted the trial of said cause to its conclusion.

II. That they deny each and every allegation in paragraph four of said third cause of action.

III. That they deny each and every allegation in paragraph five of said third cause of action, except that they have not paid the amount claimed in said cause of action, and that they refuse to pay the same, or any part thereof.

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FOURTH.

For answer to the fourth cause of action in said complaint, defendants say:

I. That they admit the facts stated in paragraphs one, two, and three of said fourth cause of action in said complaint.

II. That they deny that the value of the services rendered by plaintiff in the case mentioned in said fourth cause of action are not fixed by the statutes of the United States, and deny that said services were reasonably worth the sum of two hundred and fifty dollars, or any other sum except such sum as is provided by law.

15 III. That they deny each and every allegation in paragraph five of said fourth cause of action in said complaint, except that defendants have not paid the sum therein demanded, and that they refuse to pay the same.

FIFTH.

For answer to the fifth cause of action in said complaint defendant says:

I. That they admit the facts stated in the first and second paragraphs of said fifth cause of action in said complaint, and also admit the facts stated in the third paragraph of said fifth cause of action in said complaint, except the allegation that the services therein mentioned were continued and concluded after plaintiff's successor in office was appointed and qualified with the consent and knowledge of defendants, which said last-mentioned allegation they deny.

II. That they deny each and every allegation in paragraph four of said fifth cause of action in said complaint.

III. That they deny each and every allegation in paragraph five of said fifth cause of action in said complaint, except the allegation that defendants have not paid the sum demanded in said cause of action, and that they refuse to pay the same.

SIXTH.

That in answer to the sixth cause of action in said complaints defendants say:

16 I. That they admit the facts stated in paragrahs one and two of said sixth cause of action in said complaint.

II. That they deny each and every allegation in paragraph three of said sixth cause of action in said complaint, except that they have paid to the plaintiff between the dates in said paragraph mentioned, as compensation for fees, salary, disbursements for clerk hire and office expenses, and for necessary attendance upon the courts of the United States, and upon examinations before United States judges and commissioners, and for traveling from his place of abode to the place of holding said courts and to the places of said examinations, the sum of three thousand two hundred and forty-two and 35–100 dollars.

III. That they deny that plaintiff is entitled to the judgment demanded in said complaint, or any judgment whatever.

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For another and further defense these defendants say:

I.

That the plaintiff ought not to have and maintain his said suit against them, because they say that heretofore, to wit, in the month of February, 1890, the said plaintiff was duly appointed and commissioned the United States attorney for the district of Washington, and that he thereupon qualified and entered upon the discharge of his duties as such
17 United States attorney for said district, and that he continued to act during all the time mentioned in the complaint as said district attorney, and to perform the duties of that office, and to receive the compensation and emoluments thereof.

II.

That during all the time mentioned in said complaint the personal compensation of the United States attorney, consisting of fees, per diem, and all other emoluments by law pertaining to said office, including an annual salary, was limited by the Statutes of the United States, of which the said plaintiff had full notice and knowledge, to the sum of six thousand dollars per annum as full compensation and reward for all the services which said plaintiff rendered, or should or might have been required to render, to the United States, or to any officer or agent of the United States, in all cases in which the United States was a party or interested, or in which the said plaintiff should be directed, by the President, the Attorney-General, or the Solicitor of the Treasury of the United States, to appear, prosecute, defend, advise, or render any other service whatever, excepting only such services as he might be required to render in suits and proceedings arising under the revenue laws, and for services rendered by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue against any such officer for any act done by him, or for the recovery of any money received by such officer and paid into the Treasury of the United States, in the performance of the official duty of such officer.

18 III.

That in suits and proceedings arising under the revenue laws which should be conducted by said plaintiff, and in which the United States should be a party, the said plaintiff would be entitled to be paid four per centum upon all moneys collected or realized in any such suit or proceeding.

IV.

That in all cases in which said plaintiff should appear by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer for any act done by him, or for the recovery of any money received by him and paid into the Treasury of the United States in the performance of the official duty of such officer, said plaintiff should receive such compensation as should be certified to be proper by the court in which such suit was brought and approved by the Secretary of the Treasury.

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That in addition to the amounts in this defense above stated the said plaintiff was entitled to receive from the earnings of his office the necessary expenses of his office, including necessary clerk hire, all to be audited and allowed by the proper accounting officers of the Treasury Department of the United States.

V.

The said plaintiff has been paid by the United States for all services rendered by him as attorney of the United States for said district during all the time he held and performed the duties of said office a
19 personal compensation for the fees, salary, mileage, and emoluments of said office the full sum of six thousand dollars per annum for each year of his incumbency, and at the rate of six thousand dollars per annum for any time less than one year in which he held said office.

VI.

That said plaintiff has also been paid by the United States all of the necessary expenses of his said office, including necessary clerk hire, which was audited and allowed by the proper accounting officers of the Treasury Department.

VII.

That said plaintiff has been paid for his services in all suits and proceedings conducted by him arising under the revenue laws and in which the United States was a party the full sum of four per centum upon all moneys collected or realized in any such suit or proceeding.

VIII.

That the said plaintiff has been paid in full compensation for all services rendered by him in all suits in which he has appeared by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in which such suits had been brought against any such officer for any act done by him, or for the recovery of any money received by such officer and paid into the Treasury in the performance of the official duty of such officer, in all cases in which the compensation of plaintiff was certified to be proper by the court in which such suit was brought, and when such compensation was approved by the Secretary of the Treasury.

20 IX.

That none of the suits and proceedings mentioned in the complaint herein were suits or proceedings against any officer of the revenue for any act done by him as such officer, or for the recovery of any money received by such officer and paid into the Treasury in the performance of the official duty of such officer, except the case mentioned in the third paragraph of the third cause of action of said complaint, and that as to said suit the compensation claimed by plaintiff was not certified to be proper by the court in which said suit was brought and was not approved by the Secretary of the Treasury.

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X.

That none of the sums of money claimed by plaintiff in said complaint are for services rendered by him in any suit or proceeding arising under the revenue laws and conducted by him in which the United States was a party and in which any moneys had been collected or realized.

Wherefore defendants say that the said plaintiff is not entitled to have and recover from them any sum of money whatever, and having fully answered herein, pray to be hence discharged and to recover their reasonable costs and disbursements herein expended.

WM. H. BRINKER,
United States Attorney.

(Endorsement:) No. 225. In the U. S. circuit court for the district of Washington, eastern division. Patrick Henry Winston, plff., vs. United States of America, defts. Answer. Service of the within
21 answer acknowledged this 6th day of April, 1894, by delivery copy. Alex. M. Winston, attorney for plaintiff. Filed Apl. 6, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy. Wm. H. Brinker, U. S. attorney, 5 and 6 Colman bl'k, Seattle, Wash.

And afterwards, to wit, on the 25th day of April, 1894, there was duly filed in said court, in said cause, and amended complaint, in words and figures as follows, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,)
vs.
THE UNITED STATES, DEFENDANT.)

Amended complaint.

The plaintiff, as an amendment to the complaint herein, complains and alleges, for a seventh cause of action—

1st. That he is a resident of the city of Spokane, county of Spokane, State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

22 3rd. That during his said term of office, to wit, between February 18th, 1890, and December 31st, 1890, he became entitled to receive from the defendant the sum of six thousand six hundred and nineteen and 23–100 dollars as compensation for fees, salary, disbursements for clerk hire, office expenses, and attendance upon the courts of the United States, and upon commissioner's courts, and for traveling from his place of abode to the place of holding said courts or of said examinations; that of said sum defendant has paid plaintiff the sum of

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five thousand eight hundred and nineteen and 52–100 dollars, leaving a balance due and unpaid plaintiff of seven hundred and ninety-nine and 71–100 dollars.

4th. That thereafter and before the bringing of this suit plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

SECOND.

And for an eighth cause of action plaintiff alleges—

1st. That he is a resident of the city of Spokane, county of Spokane, State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

3rd. That during his said term of office, to wit, between the first day of January, 1891, and the first day of January, 1892, he became entitled to receive from the defendant the sum of seven thousand five
23 hundred and thirty-one and 84–100 dollars as compensation for fees, salary, disbursements for clerk hire, office expenses, and attendance upon the courts of the United States, and upon commissioner's courts, and for traveling from his place of abode to the place of holding said courts or of said examinations; that of said sum defendant has paid plaintiff the sum of six thousand seven hundred and twenty-one and 84–100 dollars, leaving a balance due and unpaid plaintiff of eight hundred and ten dollars.

4th. That thereafter and before the bringing of this suit plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

THIRD.

And for a ninth cause of action plaintiff alleges—

1st. That he is a resident of the city of Spokane, county of Spokane, State of Washington.

2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

3rd. That during his said term of office, to wit, between the 1st day of January, 1892, and the 1st day of January, 1893, he became entitled to receive from the defendant the sum of eight thousand two hundred and nineteen dollars as compensation for fees, salary, disbursements for clerk hire, office expenses, and attendance upon the courts of the United States, and upon commissioner's courts, and for traveling
24 from his place of abode to the place of holding said courts or of said examinations; that of said sum defendant has paid plaintiff the sum of seven thousand seven hundred and twenty-eight and 17–100 dollars, leaving a balance due and unpaid plaintiff of four hundred and ninety and 83–100 dollars.

4th. That thereafter and before the bringing of this suit plaintiff demanded payment of the same from defendant, but that defendant has not paid the same, and refuses to pay the same.

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Wherefore plaintiff demands judgment against the defendant for the sum of eight thousand five hundred and seventeen and 59–100 dollars ($8,517.59), and for his costs and disbursements in this action.

ALEX. M. WINSTON,
Attorney for Plaintiff.

STATE OF WASHINGTON, *County of Spokane, ss:*

Patrick Henry Winston, being duly sworn, says he is the plaintiff in the above-entitled action; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

PATRICK HENRY WINSTON.

Subscribed and sworn to before me this 25th day of April, 1894.

ARTHUR H. KENNYON,
Notary Public, residing at Spokane, Washington.

Due and personal service of the within amended complaint, by a true copy thereof, is hereby admitted at Spokane, Washington, this 25th day of April, 1894.

WM. H. BRINKER,
Attorney for Defts.

25 (Endorsed): In the circuit court of the United States, district of Washington. Patrick Henry Winston, plaintiff, vs. The United States, defendant. Amended complaint. Filed Apl. 25, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy. Alex. M. Winston, Spokane, Wash., attorney for plaintiff.

And afterwards, to wit, on the 25th day of April, 1894, there was duly filed in said court, in said cause, an answer to amended complaint, in the words and figures following, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF, *against* THE UNITED STATES OF AMERICA, DEFENDANTS.	Answer to amendments.

Answer to amendments.

The defendants for their answer to the amendment to the complaint filed herein say:

I. That for answer to paragraphs one and two of the first count of said amendment they admit the same.

II. That for answer to the third paragraph of the first count of said amendment they admit that they have paid to plaintiff the amount
26 stated in said paragraph, but they deny each and every other allegation in said paragraph contained.

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SECOND.

I. That for answer to paragraphs one and two of the second count of said amendment they admit the same.

II. That for answer to paragraph three of the second count of said amendment they admit that they have paid to plaintiff the amount stated in said paragraph, but they deny each and every other allegation in said paragraph contained.

THIRD.

I. That for answer to paragraphs one and two of the third count of said amendment they admit the same.

II. That for answer to paragraph three of said third count of said amendment they admit that they have paid to plaintiff the amount stated in said paragraph, but they deny each and every other allegation in said paragraph contained.

III. They deny that plaintiff is entitled to the judgment demanded in said amendment, or to any judgment whatever against these defendants.

27 IV. Wherefore, defendants having fully answered said amendment to said complaint, pray to be hence discharged with their reasonable costs and disbursements herein expended.

WM. H. BRINKER,
United States Attorney for the Defendants.

(Endorsed:) No. 225. In the United States circuit court, eastern division, district of Washington, Patrick Henry Winston vs. The United States. Answer to the amendments to the complaint. Filed April 25th, 1894. A. Reeves Ayres, clerk. Wm. H. Brinker, U. S. attorney, 5–6 Colman Block, Seattle, Wash.

And afterwards, to wit, on the 25th day of April, 1894, there wa, duly filed in said court, in said cause, a reply in the words and figuress as follows, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT.

Reply to answer.

The plaintiff, for a reply to the answer of the defendant herein, says and alleges—

1st. That he denies each and every allegation of said answer that states an affirmative defense to said action.

ALEX. M. WINSTON,
Attorney for Plaintiff.

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28 STATE OF WASHINGTON,
County of Spokane, ss:

Patrick Henry Winston, being duly sworn, says he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

PATRICK HENRY WINSTON.

Subscribed and sworn to before me this 25th day of April, 1894.

ARTHUR H. KENYON,
Notary Public, residing at Spokane, Washington.

Due and personal service of the within reply, by a true copy thereof, is hereby admitted at Spokane, Washington, this 25th day of April, 1894.

WM. H. BRINKER,
Attorney for Defendants.

(Endorsed on reply:) In the circuit court of the United States, district of Washington. Patrick Henry Winston, plaintiff, vs. The United States, defendant. Reply. Filed April 25, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy. Alex. M. Winston, Spokane, Wash., attorney for plaintiff.

And afterwards, to wit, on the 1st day of October, 1894, there was duly filed in said court, in said cause, the specific findings of facts in the words and figures, as follows, to wit:

29 In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } Specific findings of fact.

Findings of fact.

This cause having been heard by the court upon the evidence, and being duly advised in the premises, the court finds the following facts therein:

1. The plaintiff legally held the office and performed the duties of United States district attorney for the district of Washington from the 19th day of February, A. D. 1890, to the 30th day of May, A. D. 1893, and during all of said time was a resident of the city of Spokane, county of Spokane, in the State of Washington.

2. That during the said term of office, to wit, in and about the months of April, May, June, and July, A. D. 1890, the plaintiff, at the request of and by the direction of the defendant, appeared as attorney for General John M. Gibbon, an official of the United States, in a case instituted in the courts of the Territory of Washington, and transferred thence to the circuit court of the United States, wherein the Catholic bishop of Nesqually was plaintiff, and the said Gibbon defendant, which case involved the title of the United States to four hundred and fifty (450)

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acres of land, with the improvements thereon, known as the
30 Vancouver Military Reservation, the said land and improvements being of the value of $250,000, and as such attorney conducted the trial of said cause in the circuit court of the United States to its conclusion therein.

3. That the value of the services rendered by plaintiff in said cause were reasonably worth the sum of $5,000, of which sum defendant paid plaintiff the sum of $2,500, which sum was fixed by the Attorney-General as special compensation in said cause for said services, the law providing no specific compensation.

4. That during said term of office, to-wit, about the month of April, 1892, plaintiff, at the request of the defendant, appeared in the circuit court of appeals, ninth judicial circuit, at San Francisco, in a case wherein the defendant was appellee, and the owner of the steam tug "Pilot" was appellant, and as such attorney conducted the trial of said cause to its conclusion for the defendant. That the Attorney-General of the United States allowed plaintiff for services in said cause the sum of $400, the law providing no specific compensation, and that said services were reasonably worth said sum. Of this sum defendant paid plaintiff $212.79, retaining the balance of $187.21 on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which these services were rendered and the money earned.

5. That about the said month of April, 1892, the plaintiff, at the request of defendant, appeared for defendant in the circuit court of appeals,
31 ninth judicial circuit, at San Francisco, in a case wherein the defendant was appellant and one Gee Lee was appellee, and as such attorney conducted the trial of said cause to its conclusion. That the value of the services rendered by plaintiff in said Gee Lee Case is not fixed by law, but is reasonably worth the sum of $250, which said sum of $250 was fixed by the Attorney-General of the United States as compensation for plaintiff's services in that case. That no part of said sum of $250 has been paid plaintiff, but the whole of said sum of $250 was retained by defendant on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted plaintiff to receive for the year 1892, in which year the services were performed and the money was earned.

That during and for the said year of 1892 the defendant charged plaintiff, as a part of his maximum personal compensation and emoluments, the compensation allowed him by law for travel, on a mileage basis, and that such compensation for travel for said year 1892, or mileage, so charged against plaintiff and carried into his emolument accounts, was in excess of the sum of $187.21 retained in the Pilot Case, and the sum of $250 retained in the Gee Lee Case, to-wit, was in excess of the sum of $437.21 retained in both said cases.

6. That during his said term of office, about the month of April, 1892, plaintiff, at the request of defendant, appeared in the circuit court of appeals, ninth judicial circuit, at San Francisco, for one Brad-
32 shaw, ex-collector of customs for the defendant, for the district of Puget Sound, in a case wherein one Dunsmuir was appellant and said Bradshaw was appellee, said cause having been instituted against

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said Bradshaw for acts done by him in the discharge of his duty as collector, and as such attorney conducted the trial of said cause to its conclusion. That the value of plaintiff's services in said cause are not fixed by law, but are reasonably worth the sum of $500. That the Attorney-General has fixed the plaintiff's compensation in said cause at $310, and that said sum has not been paid to plaintiff nor credited to him, and the same will not increase his compensation for said year above the legal maximum.

7. That during his said term of office, about the month of March, 1893, plaintiff, at the request of defendant, appeared in two cases instituted in the superior court of the State of Washington, and afterwards removed to the courts of the United States, for one Edwin Eells, an Indian agent of the United States, and other officers of the United States, wherein one Frank Ross and certain Indians were plaintiffs, and said Eells and said other officials were defendants, said cases involving the right of the United States to the lands known as the Puyallup Indian Reservation, and its authority over the same and over the Indians occupying the same. That said services were begun while plaintiff was the legally acting and duly qualified United States attorney for the district of Washington, but were continued and concluded after his successor in office was appointed and qualified. That the law fixes no compensation for said services, but the value of the same was $1,500. That
33 the Attorney-General fixed the sum of $400 for compensation for work done in said cases while the plaintiff was in office, and $600 for the work done under his special management after his removal from office. That Congress, since the bringing of this action, has appropriated the sum of $600 to pay plaintiff the amount fixed by the Attorney-General for the work done after his removal from office, and plaintiff has received said sum, but that no part of the $400, for work done in said causes while he was in office, has been paid.

Plaintiff is lawfully entitled to receive and retain the following maximum personal compensation in the way of fees and emoluments for the year 1893, to wit: Fees, $2,465.75; mileage, $1,629.60; commissions on proceeds of forfeited opium, $11.60; clerk hire, printing, and other incidental expenses, approved by the Attorney-General, $776.60; aggregating the sum of $4,883.55. He has been paid, including the sum of $600 appropriated for his services in the Ross vs. Eells Puyallup Indian Case, $3,842.35. There is a balance due him for said year 1893 of $1,041.20, composed of the sum of $400 due for special services before his removal from office in the Ross-Eells Case, and of $641.20, which was withheld by defendant as being in excess of his maximum personal compensation. There was charged against plaintiff as part of his maximum personal compensation for said year 1893 as mileage $1,629.60, which amount is in excess of the amount of $1,041.20 above referred to.

8. That during plaintiff's term of office, to wit, February 19th, 1890, and December 31st, 1890, there was withheld from him as excess
34 of his maximum personal compensation the sum of $566.38, and during the year 1891 there was withheld from him as excess of his personal compensation the sum of $750. In each of said years there was charged against plaintiff and included in his emolument accounts as

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part of his maximum personal compensation an amount of mileage in excess of said sums, without which there would have been no surplus of earnings above the maximum.

As conclusions of law from the foregoing findings of fact, the court is of the opinion that the plaintiff is entitled to judgment against defendant for the following sums, to wit: $187.21 balance due in the case of The United States against the steam tug "Pilot;" $250 for services in the case of the United States against Gee Lee; $310 for services in the case of Dunsmuir against Bradshaw; $400 for services performed while United States attorney in the case of Ross against Eells; $566.38 balance due for fees earned in the year 1890, the amount being fixed by law, the same being withheld as being in excess of maximum; $750 for fees earned during the year 1891, the amount being fixed by law, the same being withheld as being in excess of maximum; $641.20 for fees earned during the year 1893, the same being fixed by law and being withheld as being in excess of maximum.

Oct. 1, 1894.

C. H. HANFORD, *Judge.*

(Endorsed:) No. 225. U. S. circuit court. Patrick H. Winston vs, The United States. Specific findings of facts. Filed Oct. 1, 1894. in the U. S. circuit court. A. Reeves, clerk. By James O'Neill, deputy.

35 And afterwards, to wit, on the 1st day of October, 1894, there was duly filed in said court, in said cause, the opinion of the court, in the words and figures as follows, to wit:

In the circuit court of the United States for the district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANTS.

Opinion.

Alexander M. Winston, for plaintiff; William H. Brinker, United States attorney, for defendants.

The plaintiff held the office and performed the duties of United States district attorney for the district of Washington, from the 19th day of February, 1890, to the 30th day of May, 1893, and he has brought this action against the United States under the provisions of the act of March 3rd, 1887, entitled "An act to provide for the bringing of suits against the Government of the United States" (1 Supp., R. S., 2nd ed., 559), to recover compensation for special services rendered by him under the direction of the Attorney-General, and for mileage in addition to payments made to him. His claim is itemized as follows:

1st. For services as attorney for the defendant's upon the trial in this court at the July term, 1890, held at Tacoma, of the case of the
36 Catholic bishop of Nesqually v. General John Gibbon, et al., involving the title to the land occupied as a garrison and military

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post at Vancouver, in this State, $2,500.00 in addition to $2,500.00 paid to him for said services.

2nd. For service as attorney for the United States, upon the hearing in the United States circuit court of appeals for the ninth circuit, at San Francisco, in April, 1892, of the case of the United States v. the steam tug "Pilot," on appeal from the district court for this district, $287.21 in addition to $212.79 paid to him for said services.

3rd. For services as attorney for the defendant upon the hearing on appeal in the said United States circuit court of appeals in April, 1892, of the case of Dunsmuir v. Bradshaw, as collector of customs for the collection district of Puget Sound, which was an action to recover a sum of money which had been exacted by said collector as a penalty under a statute of the United States, $500.

4th. For services as attorney for the United States upon the hearing in said United States court of appeals, in April, 1892, of the case of the United States v. Gee Lee, appealed from the United States district court for this district, $250.00.

5th. For services as attorney for the defendants in the superior court of the State of Washington for King County, and in this court at a term held at Seattle in March, April, May, and June, 1893, in two cases against Edwin Eells, as United States Indian agent, and certain officers of the United States Army, involving questions as to the right of the Gov-
37 ernment to prevent the building of a railroad across lands which had been allotted and patented to certain Indians pursuant to a treaty made by the United States with the Puyallup tribe (See Ross v. Eells, 56 Fed. Rep., 855), $1,500.00.

6th. For actual and necessary traveling in going from his place of abode to the several places at which terms of the United States courts are held in this district, and returning, and in going to and returning from examinations before United States commissioners of persons accused of violation of laws of the United States, between January 1st and May 30th, 1893, a balance of $1,379.84.

7th. For fees and emoluments fixed by statute, earned between February 19th and December 31st, 1890, a balance of $799.71.

8th. For the year 1891, a balance of $810.00.

9th. For the year 1892, a balance of $490.83.

That the plaintiff rendered the services charged for, as alleged by him, is not denied, and he has proved the value thereof as alleged. If the law authorized a recovery upon a quantum merit I should have no hesitency in awarding plaintiff the first five items claimed. I hold that plaintiff's services in the several cases above enumerated were not of the kind for which a fixed rate of fees or compensation is provided by law. In protecting the interests of the Government the Attorney-General often finds occasion to require the district attorney to take charge of important litigation and incur expenses in connection therewith for which the law provides no compensation. It has been usual, however, for the Treasury Department to audit and pay accounts for such
38 services and expenditures in amounts authorized by the Attorney-General, and since 1889 Congress has recognized the practice by including in each of the annual appropriation bills for sundry civil expenses

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an item for such special compensation of district attorneys as may be fixed by the Attorney-General for services not covered by salary or fees. There is no other authority given by law for paying district attorneys for services to the Government in his professional capacity not covered by his salary or fees. The plaintiff is therefore precluded from recovering any sum in excess of the amount fixed by the Attorney-General as compensation for any particular service. No allowance can be made by the court upon the basis of a quantum merit, as the law gives to the Attorney-General power to pass upon the question as to the value of the services, and his determination is final and conclusive upon the Government as well as the claimant. (U. S. v. Bashaw, 152 U. S. 436; U. S. v. Shields, 153 U. S. 88.) On this ground judgment must go against the plaintiff as to the first item, the sum allowed to him by the Attorney-General for his services in the Bishop of Nesqually Case, viz: $2,500.00 having been paid. The Attorney-General allowed in the "Pilot" Case $400.00, of which $212.79 has been paid, and the balance of $187.21 was credited and retained by the Treasury Department on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which the money was earned. The Attorney-General also allowed in the Gee Lee Case $250.00, and the same was
39 credited and withheld upon the same account. From the uncontradicted evidence I find that the plaintiff's emoluments, as stated, included compensation for travel allowed by law on a mileage basis, amounting in each year of his incumbency to more than the several sums deducted from his earnings as excess. The opinion of the Court of Claims, by Chief Justice Richardson, in the case of Smith vs. U. S. (26 C. Cla. R., 568), affirms that mileage "is a commutation or substitute for expenses estimated to be necessary for travel, and is fixed by law at ten cents a mile, which ordinarily, or on the average, it is supposed, will cover the actual amount required. It relieves public officers from the trouble of keeping itemized accounts of small disbursements and avoids controversies between them and the accounting officers upon insignificant matters. The commutation for such expenses can no more be regarded as fees and emoluments than would be items of actual expenditures if required to be included in the emolument return, which latter we apprehend nobody would claim to be either fees or emoluments." I concur in that opinion, and consider all the deductions from the plaintiff's earnings on account of excess above his lawful maximum to be erroneous. Therefore, my findings as to the two items for $187.21 and $250 will be for the plaintiff. The Attorney-General fixed the amount of the plaintiff's compensation in the case of Dunsmuir vs. Bradshaw at $310.00, and that sum has been neither paid nor credited to the plaintiff. I hold that he is
entitled to recover the same in this action. In behalf of the Gov-
40 ernment the court is urged to refuse to consider this item on the ground that plaintiff's claim has been referred to the Court of Claims, under section 1063, R. S., and the Comptroller of the Treasury desires to have the decision of that court upon the questions raised by his objections, to guide him in passing upon other claims of a similar kind. This argument would have greater weight if the Comptroller

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would accept the decisions of the Court of Claims, which have not been reversed nor overruled by the Supreme Court, and follow their guidance in passing upon similar questions. I find, however, from the record in this case that in the matter of the mileage allowed by law to district attorneys the Comptroller persists in construing the law according to his own ideas, which are at variance with the decision in the Smith Case, above referred to. It does not appear that this claim has been regularly transmitted to the Court of Claims by the Secretary of the Treasury, or the head of any department, and if it were, the item is part of a case of which this court has acquired jurisdiction, and I can find no warrant for sending the plaintiff to litigate one part of his case in another form without his consent. For the services in the Puyallup Indian's Case the Attorney-General fixed the sum of $400.00 as compensation for work done while the plaintiff was in office and $600.00 for continuation of his work under his special employment after his removal from office. Upon grounds already gone over in this opinion, I hold that the plaintiff is entitled to recover in this action the amount of $400.00 so allowed by the Attorney-General. The other
41 part of the allowance is objected to on the ground that the plaintiff was not lawfully authorized to represent his clients after his official connection with the Government had been severed. The court did not permit pending proceedings to be interrupted by the wielding of the political axe, and the plaintiff earned the compensation allowed by the Attorney-General by remaining at his post discharging his professional duty under his special employment as attorney for the defendants during the actual trial of the cases, pursuant to arrangements made previous to notice of his removal. Congress, at the last session, has made a special appropriation to pay this $600.00, and thereby removed all doubts as to the legality of allowing the same. The findings will be in favor of the plaintiff on account of this item for the full sum of $1,000.00 as allowed by the Attorney-General, but as the $600.00 appropriated by Congress for the purpose has been already paid, that much will be deducted from the amount of the judgment. As to the sixth item, I find that the total earnings in 1893, including the $1,000.00 special compensation for the Puyallup Indians' cases and mileage, amounting to $1,629.60, is the sum of $5,164.60. The plaintiff is lawfully entitled to receive and retain the following: Maximum personal compensation in the way of fees and emoluments, $2,465.75; mileage, $1,629.60; commissions on proceeds of forfeited opium, $11.60; clerk hire, printing, and other incidental expenses approved by the Attorney-General, $776.60, aggregating the sum of $4,885.55. He has been paid, including the $600.00 specially appropriated for his services in the Puyallup
42 Indians' cases, $3,842.35, so that there is a balance yet due him on his account for 1893 of $1,041.20. I deduct from this the $400.00 awarded on account of the Puyallup Indians' cases, and find in favor of the plaintiff, upon the sixth item, in the sum of $641.20.

The seventh, eighth, and ninth items may be disposed of in a bunch. Of moneys earned during the years 1890 and 1891, there was withheld as excess of the maximum the following: in 1890, $566.38; in 1891, $750.00. In each of said years there was an amount of mileage in

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excess of said sums carried into the emolument account, without which there would have been no surplus of earnings above the maximum. I therefore find in favor of the plaintiff upon the seventh item in the sum of $566.38, and upon the eighth item in the sum of $750.00. I do not find that any part of the earnings for 1892 was withheld, except part of the special compensation for services in the Gee Lee and Pilot cases, which amounts will be made up to the plaintiff by the award on account of the second and fourth items. I therefore find in favor of the Government on the ninth item.

C. H. HANFORD, *Judge*.

OCT. 1, 1894.

(Endorsement:) No. 225. In United States circuit court, district of Washington, eastern division. Patrick Henry Winston, plaintiff, vs. The United States, defendant. Opinion. Filed October 1st, 1894. A. Reeves Ayres, clerk. Alex. M. Winston, attorney for plaintiff.

43 And afterwards, to wit, on Monday, the 1st day of October, 1894, the same being the 24th judicial day of the regular September term of said court, present, the honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division.

PATRICK HENRY WINSTON, PLAINTIFF,)
vs.) Judgment.
THE UNITED STATES, DEFENDANT.)

Judgment.

This cause having been heard by the court upon the amended complaint, answer, and reply, and the court having heard the evidence and arguments of counsel for the respective parties, and the court being fully advised in the premises:

Now, on motion of counsel for plaintiff, and upon the specific findings by the court of the facts herein and the conclusions of the court upon all questions of law involved herein, it is ordered, adjudged, and decreed by the court that the said plaintiff, Patrick Henry Winston, do have and recover of and from the said defendant, the United States, the sum of three thousand one hundred and four and 79–100 dollars ($3,104.79), and costs of this suit taxed at $.

Dated this 1st day of October, 1894.

C. H. HANFORD, *Judge*.

44 (Endorsed:) No. 225. U. S. circuit court. Patrick H. Winston vs. The United States. Judgment. Filed October 1, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy.

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And afterwards, to wit, on the 1st day of October, 1894, there was duly issued out of said court an order, in the words and figures as follows, to wit:

In the United States circuit court for the district of Washington, eastern division.

PATRICK HENRY WINSTON)
vs.
THE UNITED STATES OF AMERICA.)

Now, on this day it is ordered that the defendants be, and are hereby, granted ninety days in which to prepare and file a bill of exceptions in this cause.

C. H. HANFORD, *Judge.*

OCT. 1ST, 1894.

(Endorsed:) No. 225. In the U. S. circuit court, east. divn., dist. of Wash. Patrick H. Winston vs. United States of A. Order. Filed Oct. 15, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy. Ent. in Rule Book C. Law, page 144. Oct. 15th, '94.

And afterwards, to wit, on the 27th day of March, 1895, there was duly filed in said court in said cause a petition for a writ of error, in the words and figures as follows, to wit:

45 In the circuit court of the United States, for the ninth judicial circuit, sitting in the eastern division of the district of Washington.

PATRICK HENRY WINSTON, PLAINTIFF, *against* THE UNITED STATES OF AMERICA, DEFENDANTS.) Petition for writ of error.

Petition for writ of error.

Now come the United States of America, by William H. Brinker, their attorney, and by direction of the Attorney-General of the United States, say:

That they were aggrieved by the decision and judgment of this court, made and entered on the 1st day of October, 1894, in the above-entitled cause against them, and pray that a writ of error issue for the removal of said cause and the said judgment into the United States circuit court of appeals for the ninth circuit of the United States from the said circuit court of said district of Washington, and they attach hereto their assignment of errors, and pray that the said writ of error and a proper citation be issued thereon, and a transcript of the record, pleadings, findings of facts, conclusions of law, opinion of the said circuit court, and the said judgment and said assignment of errors be duly authenticated, under the

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seal of this court, and transmitted without delay to said United States circuit court of appeals.

WM. H. BRINKER,
United States Attorney and Attorney for Defendants.

46 (Endorsed:) (Original.) No. 225. In the U. S. circuit court for the district of Washington. Patrick H. Winston vs. United States of America. Petition for writ of error. Wm. H. Brinker, U. S. attorney for defts. Filed Mch. 27, 1895, in the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

And afterwards, to wit, on the 27th day of March, 1895, there was duly filed in said court, in said cause, the assignment of errors, in the words and figures as follows, to wit:

In the circuit court of the United States for the ninth judicial circuit, sitting in the eastern division of the district of Washington.

PATRICK HENRY WINSTON, PLAINTIFF,
against
THE UNITED STATES OF AMERICA, DEFENDANTS. } No. 225.

Assignment of errors.

Come now the United States, by William H. Brinker, their attorney, who appears and prosecutes the writ of error in this behalf by direction of the Attorney-General of the United States, and say that in the record and proceedings in the above-entitled cause there is manifest error, and assign thereon the following error:

I.

47 That the said court erred in holding and deciding that the service rendered by the plaintiff in the following cases—that is to say, in the case of the Catholic Bishop of Nesqually against General John Gibbon et al., involving the title to the lands occupied as a garrison and military post at Vancouver, Washington, which was tried at the July term, 1890, of the circuit court of the district of Washington, at Tacoma, Washington; and the case of the United States vs. The Steam Tug "Pilot," which was tried in the United States circuit court of appeals, for the ninth circuit, in April, 1892, at San Francisco, California, on appeal from the district court of the district of Washington; and the case of Dunsmuir against Bradshaw, as collector of customs for the collection district of Puget Sound, which was tried in the United States circuit court of appeals, at San Francisco, California, in April, 1892; and the case of the United States against Gee Lee, which was tried in the United States circuit court of appeals, at San Francisco, California, in April, 1892; and the cases of Frank C. Ross v. Edwin Eells, as United States Indian agent, and certain officers of the United States Army, and John Cook and wife v. the same defendants, which were begun in the superior court of the State of Washington, for King County, and removed into and tried and determined in the circuit court of the United States

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for the district of Washington, were not of the kind of services for which a fixed rate of fees and compensation is provided by law.

II.

That the said court erred in holding and deciding that com-
48 pensation for the services rendered by said plaintiff in the cases mentioned in the first assignment of error, above, were not covered and provided for by the salary and fees fixed and provided by the statutes of the United States.

III.

That the said court erred in holding and deciding that the compensation for the services rendered by plaintiff in the cases mentioned in said first assignment of error were not prescribed by the statutes of the United States, nor covered by the salary and fees provided for district attorneys, but that the amount thereof was to be fixed by the Attorney-General of the United States.

IV.

That the said court erred in holding and deciding that the compensation for the services rendered by the plaintiff in the cases mentioned, in the first assignment of error above, and the right to fix and determine the amount thereof, was given by law to the Attorney-General of the United States, and that the determination thereof by the Attorney-General was final and conclusive upon the Government.

V.

That the said court erred in holding and deciding that the mileage claimed by the plaintiff for traveling from the place of abode of the plaintiff to the places of holding any court of the United States in said district of Washington, and to the places of examination before a judge or commissioner of a person charged with crime, and returning
49 therefrom, was a commutation or substitute for expenses estimated to be necessary for travel, and was intended to cover such expenses, and that said mileage for said travel could not be regarded as fees or emoluments, and so not required to be included in the emolument returns of plaintiff required by statute.

VI.

That the said court erred in holding and deciding that the amount claimed for mileage by plaintiff in traveling from his place of abode to any United States court in the district of Washington, or to the places of examination, before a judge or commissioner, of a person charged with crime, and returning therefrom was not required by law to be included in his personal compensation for each calendar year, and was authorized by law to be retained by plaintiff in addition to the maximum personal compensation prescribed by the statute.

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VII.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover the sum of $187.21 in addition to the amount paid him for services in the case of the United States against the steam tug "Pilot."

VIII.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover the sum of $310 as compensation for his services in said case of Dunsmuir against Bradshaw.

IX.

That the said court erred in refusing to dismiss from its con-
50 sideration the claim of plaintiff for such sum of $310.00, for his said services in said case of Dunsmuir against Bradshaw, as prayed by the Government, on the ground that said claim of said plaintiff had been theretofore referred by the Comptroller of the Treasury to the Court of Claims of the United States, for the decision of said Court of Claims, as provided for by section 1063 of the Revised Statutes of the United States.

X.

That the said court erred in holding and deciding that the said plaintiff, for his services in the cases of Ross v. Eells et al. and Cook and Wife v. Eells et al., was entitled to recover the sum of $400.00 after the said plaintiff had ceased to be the United States attorney for the district of Washington.

XI.

That the said court erred in holding and deciding that the said plaintiff was entitled to represent the said Edwin Eells, as Indian agent, and the said defendants, army officers of the United States, in the said cases of Ross v. Eells et al. and Cook and Wife v. Eells et al.

XII.

That the said court erred in holding and deciding that the said plaintiff had been specially employed by the United States as attorney for the defendants in said cases of Ross v. Eells et al. and Cook and Wife v. Eells et al., either in the said State court of the State of Washington or in the United States court.

XIII.

That the said court erred in refusing to charge against the plain-
51 tiff, and thereby reduce the amount of his recovery, the sum of $600.00, which had been appropriated by Congress to pay said plaintiff for his services in said cases of Ross v. Eells et al. and Cook and Wife v. Eells et al.

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XIV.

That the court erred in holding and deciding that there should be a finding in favor of the plaintiff for his services in said cases of Ross vs. Eells et al. and Cook and wife vs. Eells et al. of the sum of $1,000.

XV.

That the said court erred in holding and deciding that for the portion of the year 1893 in which the plaintiff was the United States attorney for the district of Washington he was entitled to recover as personal compensation in the way of fees and emoluments the sum of $2,465.75, and mileage in addition thereto in the sum of $1,629.60.

XVI.

That the said court erred in holding and deciding that the commissions received by plaintiff on account of forfeited opium, amounting to the sum of $11.60, should not be included in and form a part of his personal compensation and included in the maximum fixed by law, but should be allowed to the plaintiff in addition to said maximum personal compensation.

XVII.

That the said court erred in holding and deciding that there was a balance due to the plaintiff on account of services rendered for the year 1893 of $1,041.20.

52

XVIII.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover upon the sixth item of his said claim, after the deduction of the sum awarded on account of the Puyallup Indian cases, the sum of $641.20.

XIX.

That the said court erred in refusing to decide that for the services rendered by plaintiff in the cases mentioned in the first assignment of error, above, his compensation should be assimilated to the fees prescribed by section 824, Revised Statutes, as provided by section 299, Revised Statutes.

XX.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover for mileage in the year 1890, in excess of his maximum personal compensation, the sum of $566.38.

XXI.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover for mileage traveled in the year 1891 the sum of $750.00 in excess of his personal compensation for said year.

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XXII.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover for mileage for traveling from his place of abode to the several places in which the United States courts were
53 held in the district of Washington, and to the examination of persons charged with crime before commissioners, between January 1 and May 30, 1893, in the sum of $641.20.

XXIII.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover on account of travel any sum in excess of the maximum fixed by law, at $6,000.00 per year, or at the rate of $6,000.00 per year, for any time less than one year.

XXIV.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover any sum whatever in excess of $6,000.00 per year, or at that rate, for any services rendered or for mileage traveled while holding the office of district attorney for the district of Washington.

XXV.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover for his services in the case of Gee Lee the sum of $250.00.

XXVI.

That the said court erred in holding and deciding that the said plaintiff was entitled to recover the sum of $641.20 for fees earned during the year 1893, in addition to what had been allowed by the accounting officers of the Treasury, and pay to him.

XXVII.

That the said court erred in holding and deciding that the said
54 plaintiff was entitled to recover any sum in excess of $6,000.00 per year, or, at any rate, for any period less than one year, on account of any services whatever rendered by him, whether in the ordinary discharge of his duties or whether under the direction of the Attorney-General of the United States or for travel.

XXVIII.

That the said court erred in holding and deciding that, upon the facts as found by the court, the said plaintiff was entitled to recover any sum whatever upon any account.

XXIX.

That the said court erred in holding and deciding that the said plaintiff, upon the facts as found by the court, was entitled to any judgment whatever.

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XXX.

That the said court erred in holding and deciding that, upon the facts as found by the court, plaintiff was entitled to any judgment whatever.

XXXI.

That the said court erred in holding and deciding, upon the facts as found by the court, that the plaintiff was entitled to judgment.

XXXII.

That the said court erred, upon the facts as found by the court, in not rendering judgment for the defendants.

XXXIII.

That the said court erred in entering any judgment against the defendants upon the facts as found by the court.

55 Wherefore the said United States pray that the judgment of the said circuit court of the United States for the district of Washington be reversed, set aside, and for naught held, and that the said circuit court be now ordered to render judgment herein for the defendants.

WM. H. BRINKER,
United States Attorney for the District of Washington.

(Endorsed:) No. 225. In the U. S. circuit court for the district of Washington. Patrick H. Winston vs. The United States of America. Assignment of errors. Wm. H. Brinker, U. S. attorney for plff., in error. Filed March 27, 1895, in the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

And afterwards, to wit, on the 27th day of March, 1895, there was duly filed in said court, in said cause, an order, in the words and figures as follows, to wit:

In the circuit court of the United States for the ninth judicial circuit, sitting in the eastern division of the district of Washington.

PATRICK HENRY WINSTON, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANTS. } No. 225.

Order allowing writ of error, etc.

56 Come on this day the United States of America, having presented their petition praying that a writ of error issue herein for the removal of this cause and the judgment rendered herein from this court into the United States circuit court of appeals for the ninth circuit of the United States, and that a proper citation issue thereon, and that the transcript of the record, pleadings, findings of fact, conclusions of law, opinion of this court and the said judgment to be duly authenticated under the seal of this court and transmitted without delay to the said United States circuit court of appeals, and the said United States

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having also presented and filed their assignment of errors herein, and it appearing to the satisfaction of the court that the said petitioners are entitled to have the same allowed,

It is ordered that the writ of error be, and the same is hereby, allowed as prayed; and it is further ordered that upon the issuance of said writ of error the clerk of this court transmit to the said United States circuit court of appeals a transcript of the record, pleadings, findings of fact, conclusions of law, opinion of this court, and the judgment rendered in this cause, and the said assignment of errors duly authenticated as required by law, under the seal of this court, without delay.

C. H. HANFORD, *Judge*.

(Endorsed:) No. 225. In the U. S. circuit court for the district of Washington, eastern division. Patrick Henry Winston vs. The United States. Order. Filed Mch. 27th, 1895. In the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

57 And afterwards, to wit, on the 27th day of March, 1895, there was duly issued out of said court, in said cause, a writ of error, in the words and figures as follows, to wit:

UNITED STATES OF AMERICA,
District of Washington, Eastern Division, ss:

Clerk's certificate of transcript.

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the eastern division of the district of Washington, in the ninth circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to 69, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Patrick Henry Winston, plaintiff in error, vs. The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of Spokane, in the eastern division of Washington, in the ninth circuit, this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

[SEAL.] A. REEVES AYRES, *Clerk*.

58 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, sitting in the eastern division of the said district, in the ninth circuit, greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Patrick Henry Winston, plaintiff, and the United States of America, defendant, a manifest error hath happened, to the great damage of the said United States of America, as by their complaint appears, and it being

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fit that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco, in the State of California, in said circuit, on the 25th day of April next, in the said circuit court of appeals to be then and there held, that the record and proceedings aforesaid being inspected the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

59 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of March, [SEAL.] in the year of our Lord one thousand eight hundred and ninety-five, and of the independence of the United States the one hundred and nineteenth.

The above writ of error is hereby allowed.

C. H. HANFORD,
U. S. District Judge.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.
By R. M. HOPKINS,
Deputy Clerk.

(Endorsed:) Writ of error. Filed March 27th, 1895. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 27th day of March, 1895, there was duly issued out of said court a citation in the words and figures as follows, to wit:

60 In the circuit court of the United States for the ninth judicial district, sitting in the eastern division of the district of Washington.

PATRICK HENRY WINSTON, PLAINTIFF,
against
THE UNITED STATES OF AMERICA, DEFENDANTS. } No. .

Citation.

By the Honorable C. H. Hanford, one of the judges of the circuit court of the United States for the district of Washington.

To Patrick Henry Winston, the above-named plaintiff, and to A. M. Winston, his attorney:

Whereas the United States of America have lately prayed for and there has been issued a writ of error from the circuit court of appeals of the United States for the ninth circuit, to remove into said circuit court of appeals from the said circuit court of the district of Washington the cause, pleadings, proceedings, findings of fact, conclusions of law and udgment lately had and rendered in the said circuit court of the United

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States for the district of Washington, in the eastern division thereof, said judgment having been rendered in favor of you, the said Patrick Henry Winston, and said writ of error having been directed to be sued out by the Department of Justice of the United States of America, you are hereby cited to appear before said circuit court of appeals for the ninth circuit of the United States, in the city of San Francisco, in the
61 State of California, within thirty days from this date, to do and receive what may appertain to justice to be done in the premises, and to abide by and perform any judgment or order that may be rendered by said circuit court of appeals therein.

Given under my hand at the city of Seattle in the district of Washington, in the said ninth circuit, this 27th day of March in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] C. H. HANFORD,
United States District Judge, Presiding in said Court.

UNITED STATES OF AMERICA,
District of Washington, ss:

I do hereby certify that I served the within citation upon the within-named Patrick Henry Winston on the 29th day of March, A. D. 1895, by delivering personally to him a true and correct copy of said citation.

JAMES C. DRAKE,
U. S. Marshal.
By SAM. VINSON, *Deputy.*

Dated March 29th, A. D. 1895, at Spokane, Wash.

(Endorsed:) Original citation.

(Endorsed:) No. 227. In the U. S. circuit court of appeals, ninth circuit. The United States, plaintiffs in error, vs. Patrick Henry Winston, defendant in error. Transcript. From U. S. circuit court, district of Washington.

Filed April 22nd, 1893.

F. D. MONCKTON, *Clerk.*

62 United States circuit court of appeals for the ninth district.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
PATRICK HENRY WINSTON. } No. 227.

In error to the United States circuit court for the district of Washington.

H. S. Foote, esq., United States attorney; J. C. McKinstry, esq., for defendant in error.

Before McKenna, Gilbert, and Ross, circuit judges.

The defendant in error, plaintiff in the court below, sued the United States on nine causes of action, at the time of the accruing of which he was district attorney of the United States for the district of Washington.

The causes of action may be summarized as follows:

1st. For services as attorney for the defendants upon the trial in the circuit court, district of Washington, at the July term, 1890, held at

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Tacoma, of the case of the Catholic bishop of Nesqually v. General John Gibbon et al., involving the title to the land occupied as a garrison and military post at Vancouver in this State, $2,500.00 in addition to $2,500.00 paid to him for said services.

2nd. For service as attorney for the United States upon the
63 hearing in the United States circuit court of appeals for the ninth circuit at San Francisco, in April 1892, of the case of The United States v. The Steam Tug "Pilot," on appeal from the district court for this district, $287.21 in addition to $212.79 paid to him for said services.

3rd. For services as attorney for the defendant upon the hearing on appeal in the said United States circuit court of appeals in April, 1892, of the case of Dunsmiur *v.* Bradshaw, as collector of customs for the collection district of Puget Sound, which was an action to recover a sum of money which had been exacted by said collector as a penalty under a statute of the United States, $500.00.

4th. For services as attorney for the United States upon the hearing in said United States court of appeals in April, 1892, of the case of the United States *v.* Gee Lee, appealed from the United States district court for this district, $250.0'.

5th. For services as attorney for the defendants in the superior court of the State of Washington for King County, and in this court at a term held at Seattle in March, April, May, and June, 1893, in two cases against Edwin Eells, as United States Indian agent, and certain officers of the United States Army, involving questions as to the right of the Government to prevent the building of a railroad across lands which had been allowed and patented to certain Indians pursuant to a treaty made by the United States with the Puyallup tribe (see Ross *v.* Eells, 56 Fed. Rep., 855), $1,500.00.

6th. For actual and necessary traveling in going from his place of abode to the several places at which terms of the United States courts are held in this district and returning from examinations before United States commissioners of persons accused of violation of laws of
64 the United States between January 1st and May 30th, 1893, a balance of $1,379.84.

There was an allegation in the statement of each cause of action that the value of the services rendered by the plaintiff was not fixed by the statutes of the United States and was reasonably worth the sums charged, respectively.

The answer of the United States denied these allegations, but admitted the rendering of the services. As a further defense the United States alleged as follows:

"That during all the time mentioned in said complaint the personal compensation of the United States attorney, consisting of fees, per diem, and all other emoluments by law pertaining to said office, including an annual salary, was limited by the statutes of the United States, of which the said plaintiff had full notice and knowledge, to the sum of six thousand dollars per annum as full compensation and reward for all the services which said plaintiff rendered or should or might have been required to render to the United States, or to any officer or agent of the United States, in all cases in which the United States was a party or

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interested, or in which the said plaintiff should be directed by the President, the Attorney-General, or the Solicitor of the Treasury of the United States to appear, prosecute, defend, advise, or render any other service whatever, excepting only such services as he might be required to render in suits and proceedings arising under the revenue laws and for services rendered by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue against any such officer for any act done by him, or for the recovery of any money received by such
65 officer and paid into the Treasury of the United States, in the performance of the official duty of such officer.

"3. That in suits and proceedings arising under the revenue laws which should be conducted by said plaintiff and in which the United States should be a party the said plaintiff would be entitled to be paid four per centum upon all moneys collected or realized in any such suit or proceeding.

"4. That in all cases in which said plaintiff should appear by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in any suit against such officer for any act done by him, or for the recovery of any money received by him and paid into the Treasury of the United States in the performance of the official duty of such officer, said plaintiff should receive such compensation as should be certified to be proper by the court in which such suit was brought and approved by the Secretary of the Treasury.

"That in addition to the amounts in this defense above stated the said plaintiff was entitled to receive from the earnings of his office the necessary expenses of his office, including necessary clerk hire, all to be audited and allowed by the proper accounting officers of the Treasury Department of the United States."

The answer also alleges full payment of said items of charge, and "that none of the suits and proceedings mentioned in the complaint herein were suits or proceedings against any officer of the revenue for any act done by him as such officer or for the recovery of any money received by such officer and paid into the Treasury in the per-
66 formance of the official duty of such officer, except the case mentioned in the third paragraph of the third cause of action of said complaint, and that as to said suit the compensation claimed by plaintiff was not certified to be proper by the court in which said suit was brought and was not approved by the Secretary of the Treasury.

"That none of the sums of money claimed by plaintiff in said complaint are for services rendered by him in any suit or proceeding arising under the revenue laws and conducted by him in which the United States was a party and in which any moneys had been collected or realized.

"Wherefore defendants say that the said plaintiff is not entitled to have and recover from them any sum of money whatever, and having fully answered herein pray to be hence discharged and to recover their reasonable costs and disbursements herein expended."

There was an amended complaint filed containing three other causes of action for balances due for fees and emoluments fixed by statute for the years 1890, 1891, and 1892, respectively, in the amounts of $799.71, $810.00, and $490.83.

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The allegation of the complaint was the same in all the causes of action except as to the amounts due. Selecting from the first cause of action, they are as follows:

"1st. That he is a resident of the city of Spokane, county of Spokane, State of Washington.

"2nd. That from the 19th day of February, 1890, until the 30th day of May, 1893, he was the lawfully appointed and duly commissioned and qualified attorney for the defendant in and for the district of Washington.

67 "3rd. That during his said term of office, to wit, between February 18th, 1890, and December 31st, 1890, he became entitled to receive from the defendant the sum of six thousand six hundred and nineteen and 23 100 dollars as compensation for fees, salary, disbursements for clerk hire, office expenses, and attendance upon the courts of the United States and upon commissioner's courts, and for traveling from his place of abode to the place of holding said courts or of said examinations; that of said sum defendant has paid plaintiff the sum of five thousand eight hundred and nineteen and 52 100 dollars, leaving a balance due and unpaid plaintiff of seven hundred and ninety-nine and 71 100 dollars.

"4th. That thereafter, and before the bringing of this suit, plaintiff demanded payment of the same from the defendant, but that defendant has not paid the same, and refuses to pay the same."

The answer of the United States to this amended complaint admitted paragraph one of each of the causes of action, but denied all other allegations, except that it had paid plaintiff the amounts stated to have been paid.

The circuit court made findings of fact from the testimony, which may be condensed as follows: That plaintiff was district attorney for the district of Washington from the 19th of February, 1890, to the 30th of May, 1893, and was a resident of the city of Spokane, State of Washington.

That he performed the services stated in the first cause of action, and that they were reasonably worth the sum of $5,000, of which the plaintiff was paid $2,500, the amount fixed by the Attorney-General,

68 as special compensation, the law providing no specific compensation.

That he performed the services stated in the 2nd cause of action, and that they were reasonably worth the sum of $400, which was allowed by the Attorney-General, the law providing no specific compensation; that defendant paid plaintiff $212.79, retaining the balance of $187.21, claiming that this was in excess of the personal compensation and emoluments plaintiff was entitled to receive for the year in which the services were rendered.

That the services were performed as alleged in the 3rd cause of action, and that the value of the services was not fixed by law, and were worth $250, and were fixed by the Attorney-General at that sum; that it has not been paid, but has been retained on the claim that it is in excess of earnings above the maximum allowed by law for 1892, the year the services were performed.

That for said years defendant charged plaintiff as part of his maximum of personal compensation the compensation allowed by law for travel, on a mileage basis, and that such compensation was in excess of said sum of $187.21 and said sum of $250.00.

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That plaintiff performed the services as alleged in the 3rd cause of action; that their value was not fixed by law; were worth the sum of $500, and were fixed at $310 by the Attorney-General; and that said sum has not been paid, and will not increase his compensation for the year above the legal maximum.

69 That the services alleged in the fourth cause of action were performed as alleged. That they were begun while plaintiff was district attorney, and finished afterwards, and compensation was respectively fixed for them by the Attorney-General at $400 and $600. That Congress, since the beginning of the action, has appropriated the sum of $600 to pay plaintiff, and he has received the same, but the $400 has not been paid.

That "plaintiff is lawfully entitled to receive and retain the following maximum personal compensation in the way of fees and emoluments for the year 1893, to wit: Fees, $2,465.75; mileage, $1,629.60; commissions on proceeds of forfeited opium, $11.60; clerk hire, printing, and other incidental expenses, approved by the Attorney-General, $776.60, aggregating the sum of $4,883.55. He has been paid, including the sum of $600 appropriated for his services in the Ross vs. Eells Puyallup Indian case, $3,842.35. There is a balance due him for said year 1893 of $1,041.20, composed of the sum of $400 due for special services before his removal from office in the Ross-Eells case, and of $641.20, which was withheld by defendant as being in excess of his maximum personal compensation. There was charged against plaintiff as part of his maximum personal compensation for said year 1893 as mileage $1,629.60, which amount is in excess of the amount of $1,041.20 above referred to.

"That during plaintiff's term of office, to wit, February 19th, 1890, and December 31st, 1890, there was withheld from him as excess of his maximum personal compensation the sum of $566.38, and during the year 1891 there was withheld from him as excess of his personal com-

70 pensation the sum of $750.00. In each of said years there was charged against plaintiff and included in his emolument accounts as part of his maximum personal compensation an amount of mileage in excess of said sums, without which there would have been no surplus of earnings above the maximum."

As conclusion of law the court found and gave judgment for the following sums:

$187.21, balance due on 2nd cause of action; $250, due on 3rd cause of action; $400, on 4th cause of action; $566.38, for fees earned in the year 1890; $750, for fees in 1891; $641.20, for fees in 1891, the same being, respectively, fixed by law and being withheld as being in excess of maximum.

In thirty-three assignments the United States assigns these findings and rulings as error.

The case is presented on the judgment roll alone.

After stating the case as above, McKenna, circuit judge, delivered the opinion of the court, as follows:

We must accept as correct and legal the finding of the court as to the amount of fees and mileage earned by the plaintiff, and the fact that it was by including the mileage the United States made the amounts sued

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for by the defendant in error to be in excess of the maximum compensation allowed by law. That this could be legally done seems to be the basis of the answer of the United States.

In the case of Smith vs. United States (26 Court of Claims Reports, 568) the contrary was held, and this decision has been affirmed by
71 the Supreme Court of the United States (158 U. S., 346).

Latter court, speaking by Mr. Justice Brewer, said: "While an allowance for travel fees, or mileage, is by section 823 included in the fee bill, we think it was not intended as compensation to a district attorney for services performed, but rather as a disbursement for expenses, or presumed to be incurred in traveling from his residence to the place of holding court or to the office of the judge or commissioner."

It follows from this, and from the effect necessary to be given to the finding of the circuit court, that there was no error in allowing the fees earned in the years 1890, 1891, and 1893, to wit, the items of $566.38, $750, and $641.20.

This leaves for consideration only the fees allowed in special cases, to wit, The Pilot vs. United States, Dunsmuir vs. Bradshaw, United States vs. Gee Lee, and Ross vs. Eells.

The services in the first three cases were performed, at the request of the Attorney-General, in this court, and the compensation for them fixed by him. Part of the sum allowed in The Pilot vs. United States was paid, and the balance was retained because it was in excess of the maximum of personal compensation allowed by law. The same reason was given for the non-payment of the fee in Gee Lee vs. United States. Why the fees in the other two cases were retained does not appear. However, it is now broadly contended that the fees were illegal; that the services for which they are claimed the plaintiff was compelled to render at the request or direction of the Attorney-General, and that there is no authority of law for paying him any fee in excess of the fees
72 allowed by law under section 824 and the statutes giving the district attorney of Washington double fees. It is further urged that the findings show the fees allowed are in excess of any fees that could have been allowed by section 824 and 299 of the Revised Statutes. This contention depends upon the answer to the question whether the provisions of the statute relating to district attorneys are to be confined to services rendered within their districts or are to be construed as governing services rendered elsewhere, making these as much official as the others.

Section 767 of the Revised Statutes provides that:

"There shall be appointed in each district, except in the middle district of Alabama and the northern district of Georgia and the western district of South Carolina, a person learned in the law to act as attorney of the United States in such district. * * *"

By this section the sphere of his duty is his district. He is attorney for the United States within that, and section 771, which defines his duties, repeats the limitation. It is as follows:

"SEC. 771. It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the

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United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue for any act done by them or for the recovery
73 of any money exacted by or paid to such officers and by them paid into the Treasury."

Sections 823 and 824 only provided the fees and compensation, stating and enumerating the instances of service and fixing a fee for each of them. It is not necessary to quote these sections at length, as manifestly they are only incidental to our inquiries. It may be observed, however, that the mileage allowed by section 824 is confined to traveling to United States courts in his district.

Besides these sections, section 299 must be considered. It is as follows:

"SEC. 299. All accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, or of any State when the United States is interested but is not a party of record, or in cases instituted against the officers of the United States, or their deputies or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party."

Special stress is put upon this section by counsel for the United States, as fixing the compensation for services rendered by a district attorney outside of his district. But the section is silent as to the locality of the service. Besides, it is but a direction to the officers of the Treasury of the manner of auditing an account of certain official services, and,
74 while it gives a measure of their compensation, it does no more. It certainly does not enlarge the powers of a district attorney or his official scope. It would have strange and confusing consequences if it did. Under it any district attorney could claim or be compelled to take authority in every district in the country besides the one to which he was appointed.

It seems to us, therefore, that all these provisions apply to services of a district attorney rendered within his district, and for services outside of it they prescribe no rule.

The United States also claims that the plaintiff is precluded from recovery to the extent awarded by the circuit court by section 3 of the act of June 20, 1874 (18 Stats. at Large, 101), which provides that "no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States, beyond his salary or compensation allowed by law; provided, that this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

This statute, like the sections of the Revised Statutes already considered, must be confined to "compensation or perquisites" claimed officially. The words "compensation or perquisites" import this. The provision was no doubt intended to give exactness and confine the remuneration of officers to the fees and compensation expressly allowed by the various and appropriate statutes.

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The services in the cases of Ross vs. Eells were rendered within
75 plaintiff's district. The cases were commenced in a State court and removed to the Federal court. The best view which can be taken of the services is that they are governed by section 299, Revised Statutes, supra. Even if this be so, defendant in error urges that, notwithstanding, the compensation claimed must be allowed because (1) the record is silent as to whether the Attorney-General and the accounting officers assimilated the fees under section 824, and that these officers must be favored with the presumption that they knew the law and properly performed their official duty; (2) that the only services similar to those for which Winston (defendant in error) seeks a recovery are rendered by attorneys especially retained on behalf of the Government in particular cases, and that for such services the Attorney-General is authorized to fix the amount of compensation, and that in this manner at least the fees of defendant in error were correctly assimilated by virtue of section 299.

We do not think either position is well taken. We think the record is very clear that the compensation allowed by the Attorney-General, to wit, $400, was not allowed in assimilation to any fee provided for by section 824, or that the test of cases under section 299 is what would be allowed to private counsel employed by the Attorney-General. It follows, therefore, it was error to allow this item, and the judgment must be modified accordingly, and it is so ordered. In all else it is affirmed.

(Endorsed:) Opinion. Filed Feb. 10, 1896. F. D. Monckton, clerk.

76 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES, PLAINTIFFS IN ERROR, }
vs. } No. 227.
PATRICK HENRY WINSTON. }

MONDAY, *February 10, 1896.*

Dissenting opinion of Judge E. M. Ross.

77 Ross, circuit judge, dissenting:

I dissent. The items of $566.38, $750.00, and $641.20 allowed the plaintiff by the court below, and for which he was given judgment, were for fees legally earned by him in the years 1890, 1891, and 1893, respectively, and duly allowed by the accounting officers, but withheld by the Treasury Department upon the ground that they were all in excess of $6,000 per annum, the maximum compensation allowed by law to district attorneys. To make up that maximum, however, the officers of the Treasury included mileage fees allowed to the plaintiff exceeding in amount the aggregate of the three items above stated. In United States vs. Smith (158 U. S.), it was held that mileage fees constitute no part of the compensation allowed district attorneys for services; from which it necessarily results that the plaintiff was properly awarded by the court below judgment for the sums, respectively, of $566.38, $750.00, and $641.20.

But the amounts awarded the plaintiff in the court below in the cases entitled The Pilot vs. United States, Dunsmuir vs. Bradshaw, United States vs. Gee Lee, and Ross vs. Eells, have no such basis to rest upon.

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In the first three of these cases the services for which the plaintiff was allowed compensation were rendered outside of his district, and in this court of appeals at the city of San Francisco. The services were rendered by the direction of the Attorney-General, which officer fixed the compensation to be allowed the plaintiff for his services in the case of The Pilot vs. United States at the sum of $400; in the case
78 of Dunsmuir vs. Bradshaw at $310.00, and in the case of United States vs. Gee Lee at $250.00.

In Ross vs. Eells the plaintiff's services were rendered within the district of Washington, of which district the plaintiff was United States attorney from the 19th day of February, 1890, to May 30th, 1893. In March, 1893, two suits were brought in the State court of Washington by one Frank Ross and certain Indians against Edwin Eells and other officers of the United States, in which suits the plaintiff, at the request of the United States, appeared and caused them to be removed into the United States court for the district of Washington. Part of the plaintiff's services in those suits were rendered while he held the position of attorney for the Government, and a part after his term of office had expired. For the services rendered by him while in office the Attorney-General made an allowance to the plaintiff of $400.00, which has not been paid; and for services rendered by him after his term of office expired the Attorney-General made an allowance of $600, for which Congress subsequently made an appropriation, and which the plaintiff has received.

The questions, therefore, remaining for decision are whether the plaintiff is entitled to the judgment he recovered in the court below, for the respective sums allowed him by the Attorney-General for his services rendered while in office in his own district in the case of Ross vs. Eells, and in this court of appeals, in San Francisco, in the cases entitled, respectively, The Pilot vs. United States, Dunsmuir vs. Bradshaw,
79 and United States vs. Gee Lee. And they depend for solution upon the provisions of the statute, for it is clear that unless there is statutory authority for the claims of the plaintiff the court is without power to give judgment against the United States therefor.

"Fees allowed to public officers," said the court in United States vs. Eells (153 U. S., 88, 91), "are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials."

Turning now to the provisions of the statute in respect to the compensation allowed district attorneys, we find it provided by sections 823 and 824 of the Revised Statutes, as follows:

"SEC. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, * * * except in cases otherwise expressly provided by law * * *."

"SEC. 824. * * *

"For examination by a district attorney before a judge or commissioner of persons charged with crime, $5.00 a day for the time necessarily employed.

"For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the

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the place of his abode, and for his attendance when the court is held elsewhere, $5.00 for each day of the term.

80 "For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

"When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to attorney's fees herein provided, a counsel fee in proportion to the importance and difficulty of the cause, not exceeding $30.00."

Sections 825, 826, and 827 of the Revised Statutes, relating as they do to fees allowed the district attorney in revenue cases and in suits on official bonds, have no application to the present case and need not, therefore, be referred to.

By section 771 of the Revised Statutes it is provided that—

"It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear on behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury."

By the action last mentioned it is made the duty of a district attorney, among other things, to prosecute in his district "all civil actions

81 in which the United States are concerned." This requirement is confined to his district, and his compensation provided for by sections 823 and 824, supra, is for services rendered within his own district. None of these provisions of law relate to services rendered by district attorneys outside of their districts.

By section 3 of the act passed by Congress June 20, 1874 (18 Stat. 109), it is provided that "no civil officer of the Government shall hereafter receive any compensation or perquisite directly or indirectly from the Treasury or property of the United States beyond his salary or compensation allowed by law, provided that this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys, as now allowed by law, for the performance of services not covered by their salaries or fees."

This proviso, the Supreme Court held in United States *v.* Smith, supra, "authorizes the Department of Justice to employ and pay district attorneys 'as now allowed by law' for the performance of services not covered by their salaries or fees;" but that it can not be presumed "that Congress intended thereby to throw the door open to district attorneys to charge what they deemed to be or what proved to be a reasonable sum for the performance of such services, as the proviso specially limited them to the cases in which they had heretofore been allowed to be employed and paid by the Department for services not covered by their salaries or fees."

82 The proviso, the court proceeded to say, "was probably designed to be read in connection with Revised Statutes, section 299, providing that 'all accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United

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States * * * where the United States is interested, but is not a party of record * * * shall be audited and allowed as in other cases, assimilating the fees as near as possible to those provided by law for similar services in cases in which the United States is a party.'"

It is perfectly clear from the findings of the court below that the amounts allowed by the Attorney-General to the plaintiff, upon which the court below proceeded in giving him judgment for services rendered in his capacity of district attorney in his district in the cases entitled Ross vs. Eells, and in this court in the cases entitled, respectively, The Pilot vs. United States, Dunsmuir vs. Bradshaw, and United States vs. Gee Lee, were not assimilated to the fees and compensation provided for by section 824 of the Revised Statutes referred to in the proviso to section 3 of the act of June 20, 1874, as held by the Supreme Court in United States vs. Smith, supra.

The fact that such assimilated fees often may and in this case will be very inadequate compensation cannot justify this court in sustaining a judgment against the United States not justified by the law as it exists.

Whether a district attorney can be compelled to render services for the Government outside of his district, by the direction of the
83 Attorney-General, is a question we are not called upon to decide.

That the Attorney-General is at liberty to call upon the district attorney in each district to defend, as a part of his official duty, the interest of the Government in any suit there pending in which it is interested, seems to be held in the case of The United States vs. Smith. It is also there held that the provision found in section 363 of the Revised Statutes authorizing the Attorney-General, whenever the public interest requires it, to employ and retain in the name of the United States such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and to stipulate with such assistant attorneys and counselors the amount of compensation, does not contemplate that the district attorney himself shall be so employed.

It results from what has been said that the allowances made by the court below to the plaintiff for services rendered in the cases entitled, respectively, Ross vs. Eells, The Pilot vs. United States, Dunsmuir vs. Bradshaw, and United States vs. Gee Lee, were without authority of law, and that the judgment to that extent is erroneous.

I therefore think the cause should be remanded to the court below with directions to modify the judgment in accordance with the views above expressed.

(Endorsed:) Dissenting opinion. Filed Feb. 10, 1896. F. D. Monckton, clerk.

84 The United States circuit court of appeals for the ninth circuit.

UNITED STATES, PLAINTIFFS IN ERROR,
vs.
PATRICK HENRY WINSTON. } No. 227.

In error to the circuit court of the United States for the district of Washington.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, and was argued by counsel.

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On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, modified, in accordance with the opinion of this court, and as so modified the same is affirmed.

(Endorsed:) Judgment. Filed Feb. 10th, 1896. F. D. Monckton, clerk.

85 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
PATRICK HENRY WINSTON, DEFENDANT IN ERROR.

Petition for writ of error.

Now come the United States of America, by Henry S. Foote, United States attorney for the northern district of California, and, by direction of the Attorney-General of the United States, say:

That they were aggrieved by the decision and judgment of the United States circuit court of appeals, ninth circuit, made and entered herein on the 10th day of February, 1896, and pray that a writ of error issue out of this court for the removal of said cause and the said judgment into the United States Supreme Court from the said United States circuit court of appeals, ninth circuit, and they attach hereto their assignment of errors, and pray that the said writ of error and a proper citation be issued thereon, and a transcript of the record, opinion of the said circuit court of appeals, and the judgment and said assignment of errors be duly

86 authenticated under the seal of the said circuit court of appeals, and transmitted without delay to the said Supreme Court of the United States.

H. S. FOOTE,
United States Attorney, and Attorney for Plaintiffs in Error.

Allowed June 23d, 1896.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

86½ (Indorsed:) No. 227. In the Supreme Court of the United States of America. The United States of America, plaintiffs in error, vs. Patrick Henry Winston, defendant in error. Petition for writ of error. Service of the within by copy admited this day of 189 . , attorney for . Filed July 13, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. Henry S. Foote, United States attorney northern district of California, U. S. Appraisers' Building, room 61.

87 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
PATRICK HENRY WINSTON, DEFENDANT IN ERROR.

Assignment of errors.

Now come the United States of America, by Henry S. Foote, esq., their attorney, who appears and prosecutes the writ of error in this

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behalf by direction of the Attorney-General of the United States, and say that in the record and proceedings in the above-entitled cause there is manifest error, and assign thereon the following errors:

I.

That the United States circuit court of appeals for the ninth judicial circuit erred in affirming the judgment and decision of the United States circuit court, ninth circuit, eastern division of Washington, holding and deciding that the service rendered by the defendant in error in the following cases, that is to say, in the case of the Catholic Bishop of Nesqually against General John Gibson et al., involving the lands occupied as a garrison and military post at Vancouver, Washington, which was
88 tried at the July term, 1890, of the said circuit court of the district of Washington, at Tacoma, Washington; and the case of the United States vs. The Steam Tug "Pilot," which was tried in the said United States circuit court of appeals for the ninth circuit, in April, 1892, at San Francisco, California, on appeal from the district court of the district of Washington; and the case of Dunsmuir against Bradshaw, as collector of customs for the collection district of Puget Sound, which was tried in the said United States circuit court of appeals at San Francisco, California, in April, 1892; and the case of the United States against Gee Lee, which was tried in the said United States circuit court of appeals at San Francisco, California, in April, 1892, were not of the kind of services for which a fixed rate of fees and compensation is provided by law.

II.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that compensation for the services rendered by said defendant in error in the cases mentioned in the first assignment of errors above were not covered and provided for by the salary and fees fixed and provided by the statutes of the United States.

III.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the compensation for the services rendered by defendant in error in the
89 cases mentioned in said first assignment of errors were not prescribed by the statutes of the United States, nor covered by the salary and fees provided for district attorneys, but that the amount thereof was to be fixed by the Attorney-General of the United States.

IV.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the compensation for the services rendered by the defendant in error in the cases mentioned in the said first assignment of error, and the right to fix and determine the amount thereof was given by law to the Attorney-General of the United States, and that the determination thereof by the Attorney-General was final and conclusive upon the Government.

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V.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the mileage claimed by the defendant in error for traveling from the place of his abode to the places of holding any court of the United States in said district of Washington, and to the places of examination before a judge or commissioner of a person charged with crime, and returning therefrom, was a commutation or substitute for expenses estimated to be necessary for travel, and was intended to cover such expenses, and that said mileage for said travel could not be regarded as fees or emoluments, and so not required to be included in the emolument returns of said defendant in error required by statute.

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VI.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the amount claimed for mileage by defendant in error in traveling from his place of abode to any United States court in the district of Washington, or to the places of examination, before a judge or commissioner, of a person charged with crime, and returning therefrom, was not required by law to be included in his personal compensation for each calendar year, and was authorized by law to be retained by defendant in error in addition to the maximum personal compensation prescribed by the statute.

VII.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the said defendant in error was entitled to recover the sum of $187.21 in addition to the amount paid him for services in the case of the United States against the steam tug "Pilot."

VIII.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the said defendant in error was entitled to recover the sum of $310 as compensation for his services in said case of Dunsmuir against Bradshaw.

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IX.

That the said circuit court of appeals erred in refusing to dismiss from its consideration the claim of defendant in error for said sum of $310 for his services in said case of Dunsmuir against Bradshaw, on the ground that said claim of said defendant in error had been theretofore referred by the Comptroller of the Treasury to the Court of Claims of the United States for the decision of said Court of Claims, as provided for by section 1063 of the Revised Statutes of the United States.

X.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court in refusing to charge against the

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defendant in error, and thereby reduce the amount of his recovery, the sum of $600.00, which had been appropriated by Congress to pay him for his services in the cases of Ross v. Eells et al., and Cook and Wife v. Eells et al., which cases were begun in the superior court of the State of Washington, for King County, and removed into and tried and determined in the circuit court of the United States for the district of Washington.

XI.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the commissions received by defendant in error on account of forfeited opium, amounting to the sum of $11.60, should not be included in and form a part of his personal compensation and included in the maximum
92 fixed by law, but should be allowed to the defendant in error in addition to said maximum personal compensation.

XII.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that there was any balance due to the defendant in error on account of services rendered for the year 1893.

XIII.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court refusing to decide that for the services rendered by defendant in error in the cases mentioned in the first assignment of error, above, his compensation should be assimilated to the fees prescribed by section 824, Revised Statutes, as provided by section 299, Revised Statutes.

XIV.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the said defendant in error was entitled to recover on account of travel any sum in excess of the maximum fixed by law at $6,000.00 per year, or at the rate of $6,000.00 for any time less than one year.

XV.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the said defendant in error was entitled to recover any sum whatever in excess of $6,000.00 per year, or at that rate, for any services rendered, or
93 for mileage travel while holding the office of district attorney for the district of Washington.

XVI.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that the said

defendant in error was entitled to recover, for his services in the case of Gee Lee, the sum of $250.00.

XVII.

That the said circuit court of appeals erred in affirming the judgment and decision of the said circuit court holding and deciding that, upon the facts as found by the court, the said defendant was entitled to recover any sum whatever or was entitled to any judgment whatever.

XVIII.

That the said circuit court of appeals erred in refusing to reverse the said judgment and decision of the circuit of the United States for the district of Washington, and in refusing to order said circuit court to render judgment herein in favor of plaintiffs in error.

Wherefore the said United States pray that the judgment and decision of the said United States circuit court of appeals, in so far as the same affirms the judgment of the said circuit court of the United States for the district of Washington, be reversed and set aside, and that the said circuit court be now ordered to render judgment herein for the plaintiffs in error.

H. S. FOOTE,
United States Attorney.

94 (Indorsed:) D. No. 227. In the Supreme Court of the United States of America. The United States of America, plaintiffs in error, vs. Patrick Henry Winston, defendant in error. Assignment of errors. Service of the within , by copy admitted this day of , 189 . , attorney for . Filed July 13, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. Henry S. Foote, United States attorney northern district of California, U. S. Appraisers' Building, room 61.

95 United States circuit court of appeals for the ninth circuit.

UNITED STATES, PLAINTIFFS IN ERROR,
vs.
PATRICK HENRY WINSTON. } No. 227.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing ninety-three pages, numbered from one to ninety-three, both inclusive, to be a full, true, and correct copy of the printed transcript of record, and of all proceedings in the above-entitled cause in our said circuit court of appeals, and that the same, including the original petition for writ of error and assignment of errors, hereto prefixed, constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 13th day of July, A. D. 1896.

[SEAL.] F. D. MONCKTON, *Clerk.*

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96 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the United States circuit court of appeals for the ninth circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between The United States, plaintiff in error, and Patrick Henry Winston, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of June, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

97 *The answer of the judges of the United States circuit court of appeals for the ninth circuit.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said circuit court of appeals, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court:

[SEAL.] F. D. MONCKTON, *Clerk.*

(Indorsed:) D. No. 227. U. S. circuit court of appeals, 9th circuit. The United States, plffs. in error, vs. Patrick Henry Winston, writ of error. Filed July 13, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

98 UNITED STATES OF AMERICA, *ss:*

To PATRICK HENRY WINSTON, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United

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States circuit court of appeals for the ninth circuit wherein the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 23d day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

99 On this tenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Thos. J. Gallagher, depty. U. S. marshal, Nor. Dist. of Cala., before me, the subscriber, F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, and makes oath that he delivered a true copy of the within citation to J. C. McKinstry, attorney at law, in San Francisco, San Francisco, State of California, on June 30, 1896, and counsel of record for said Patrick Henry Winston.

THOS. J. GALLAGHER.

Sworn to and subscribed the 10th day of July, A. D. 1896.

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Indorsed:) D. No. 227. U. S. circuit court of appeals, 9th circuit. The United States, plffs. in error, vs. Patrick Henry Winston. Citation. Filed July 13, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

(Indorsement on cover:) Case No. 16344. Term No. 205. The United States, plaintiff in error, vs. Patrick Henry Winston. U. S. circuit court of appeals, 9th circuit. Filed July 23rd, 1896.

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13892

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 272.

THE UNITED STATES, APPELLANT,

vs.

JOHN W. HERRON.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 11, 1897.

(16446.)

13893

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 272.

THE UNITED STATES, APPELLANT,

vs.

JOHN W. HERRON.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

JOHN W. HERRON
v.
THE UNITED STATES. } No. 18264.

I.—*Communication of Secretary of Treasury referring claim, filed February 14, 1894.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 14, 1894.

The Honorable the Chief Justice and Judges of the Court of Claims:

Pursuant to the provisions of section 1063 of the Revised Statutes of the United States, I have the honor to refer to your honorable court for adjudication the claim of John W. Herron for services as United States attorney rendered in several cases against the warden of the Ohio penitentiary, in the United States circuit court S. D. O., E. D., and in the circuit court of appeals held at Louisville, Kentucky, the whole claim, amounting to $425.00, having been approved by the Attorney-General.

The claim is referred at the request of the First Comptroller of the Treasury, who certifies that it involves controverted questions of law, and that the decision will affect a class of cases, and will furnish a precedent for future action in the adjustment of a class of cases.

All the papers in the case enclosed by the First Comptroller in his letter of the 12th instant are herewith transmitted.

Respectfully, yours,

W. E. CURTIS,
Acting Secretary.

2 In the Court of Claims.

JOHN W. HERRON
vs.
THE UNITED STATES. } No. 18264.

II.—*Petition filed April 4, 1895.*

To the Honorable the Judges of the Court of Claims:

Your petitioner, John W. Herron, a resident and citizen of the State of Ohio, respectfully represents—

That during the year 1893 he was United States attorney for the southern district of Ohio, having been regularly appointed, confirmed, commissioned, and acting in such capacity.

I.

During the year 1893, several writs of habeas corpus were sued by Sidney S. Pridgeon, William H. Bolus, William Skaggs (in two cases), and Lafayette Simpson, respectively, against the warden of the Ohio penitentiary.

The several suits were independent, one from the other, and were defended separately. In each case a discharge was ordered, and in each case an appeal was taken to the circuit court of appeals.

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All of these cases were defended by your petitioner, by direction of the Attorney-General. Petitioner rendered an account against the United States for services so rendered as follows:

In the case of	Sidney S. Pridgeon	$100.00
	William H. Bolus	25.00
	William Skaggs	25.00
	William Skaggs	25.00
	Lafayette Simpson	100.00
		$275.00

The account as presented was verified by your petitioner, and approved by the Hon. George H. Sage, judge of the southern district of Ohio, who adds to his approval the following: "I think the charges not only reasonable, but moderate."

II.

The said cases, Sidney S. Pridgeon, William H. Bolus, two cases of William Skaggs, and Lafayette Simpson, were prepared and argued by your petitioner on appeal in the circuit court of appeals at Cincinnati, where the judgments rendered in the court below were affirmed. These cases were then appealed from the circuit court of appeals, by
3 direction of the Solicitor-General, to the Supreme Court of the United States.

Petitioner presented his account against the United States for services rendered in said cases on appeal for $150.00.

He verified his account by oath, and the same was approved by Hon. William H. Taft, judge of the circuit court of appeals for the sixth circuit. The original accounts, in which the services are more specifically set forth, with verifications and approvals, are on file in this case, and petitioner requests that they may be regarded as part of this petition.

III.

The two accounts above referred to were forwarded to the Attorney-General, by him approved in the sum of $425.00, and referred to the First Auditor of the Treasury on the 23d day of January, 1894.

IV.

Under the provisions of section 1063 of the Revised Statutes, the claim was referred to this court on the 14th day of February, 1894, at the request of the First Comptroller of the Treasury, who certified that it involves controverted questions of law, and that the decision will affect a class of cases, and will furnish a precedent for future action in the adjustment of cases.

V.

Petitioner says that the whole amount of the claim, viz, four hundred and twenty-five dollars ($425.00), is due and unpaid; that no assignment of the claim has ever been made; and that he was and is the sole owner thereof.

He therefore asks judgment in his favor in the sum of four hundred and twenty-five dollars ($425.00).

DUDLEY & MICHENER,
Attorneys for Claimant.
F. P. DEWEES,
Of Counsel.

BLEED. THR

DISTRICT OF COLUMBIA, *ss:*

Louis T. Michener, being duly sworn, deposes and says that he is a member of the firm of Dudley & Michener, who are the attorneys in fact for John W. Herron, and is authorized by a power of attorney to verify the pleadings in this case, and that the matters and things set forth in the foregoing petition are true in substance and in fact as he is informed and verily believes.

LOUIS T. MICHENER.

Subscribed and sworn to before me this 4th day of April, A. D. 1895.

[SEAL.]

L. P. SQUIRE,
Notary Public.

4 III.—*Traverse, filed May 11, 1896.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

5 IV.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, on the evidence, makes the following

FINDINGS OF FACT.

I.

Under the provisions of section 1063 of the Revised Statutes the claim was referred to this court on the 14th day of February, 1894, at the request of the First Comptroller of the Treasury, who certified that it involves controverted questions of law, and that the decision will affect a class of cases and will furnish a precedent for future action in the adjustment of cases.

II.

During the year 1893 claimant was United States district attorney for the southern district of Ohio.

III.

During the year 1893 writs of habeas corpus were sued in the circuit court for the southern district of Ohio respectively by Sidney S. Pridgeon,

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William H. Bolus, William Skaggs (in two cases), and Lafayette Simpson, United States prisoners confined in the Ohio penitentiary, against the warden thereof.

The several suits were independent one from the other and were defended separately. In each case a discharge was ordered, and in each case an appeal was taken to the circuit court of appeals.

All of these cases were defended by claimant by direction of
6 the Attorney-General. Claimant rendered an account against the United States for services so rendered, as follows:

In the case of Sidney S. Pridgeon	$100.00
William H. Bolus	25.00
William Skaggs	25.00
William Skaggs	25.00
Lafayette Simpson	100.00
	$275.00

The account as presented was verified by claimant and approved by the Hon. George H. Sage, judge of the southern district of Ohio, who adds to his approval the following: "I think the charges not only reasonable, but moderate."

IV.

The said cases, Sidney S. Pridgeon, William H. Bolus, two cases of William Skaggs, and Lafayette Simpson, were prepared and argued by claimant on appeal in the circuit court of appeals at Louisville, Kentucky, where the judgments in the court below were affirmed. These cases were then appealed from the circuit court of appeals, by direction of the Solicitor-General, to the Supreme Court of the United States.

Claimant presented his account against the United States for services rendered in said cases on appeal for $150.00.

He verified his accounts by oath, and the same was approved by Hon. William H. Taft, judge of the circuit court of appeals for the sixth circuit.

The only instructions given by the Attorney-General to claimant to act for defendants in the circuit court of appeals is contained in the following letter:

JULY 22ND, 1893.

JOHN W. HERRON, Esq.,
U. S. Attorney, Cincinnati, Ohio.

SIR: I am in receipt of a letter from Mr. Speed, U. S. attorney for Oklahoma, in which he says that an examination of the record in the cases of Pridgeon and Skaggs shows that the sentence was
7 imprisonment at hard labor.

You are hereby directed to take an appeal to the circuit court of appeals from the order of Judge Sage allowing the writ of habeas corpus, being careful that the sureties on their recognizances are as ample and secure as possible.

Very respectfully,

L. MAXWELL, Jr.,
Acting Attorney-General.

And the Attorney-General did not certify, as required by section 365, R. S., that the services were actually rendered, and that same could not be performed by the Attorney-General or Solicitor-General or the officers of the Department of Justice or by the district attorneys.

Nor did claimant take another oath upon entering upon this employment.

V.

The two accounts above referred to were forwarded to the Attorney-General, by him approved in the sum $425.00, and referred to the First Auditor of the Treasury on the 23rd day of January, 1894.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entited to recover on finding three (III) an assimilated fee of $10 in each case, and on finding four (IV) $150, making in all the sum of two hundred dollars ($200), under the decision in the recent case of Milchrist (31 Ct. Cls. R.,), and subject to adjustment in the Treasury Department as to the claimant's maximum compensation under the decision in the Harmon Case (147 U. S., 268, 282).

The amount of the allowances as set forth in finding three (III) are disallowed.

8 V.—*Judgment of the court.*

JOHN W. HERRON
vs.
THE UNITED STATES. } No. 18264.

At a Court of Claims held in the city of Washington on the 29th day of June, 1896, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, John W. Herron, do have and recover of and from the United States the sum of two hundred dollars.

BY THE COURT.

(The court filed no opinion in this case.)

9 VI.—*Application for and allowance of appeal.*

JOHN W. HERRON
v.
THE UNITED STATES. } No. 18264.

From the judgment rendered in the above-entitled cause on the 29th day of June, 1896, in favor of claimant, the defendants, by their Attorney-General, on the 5th day of August, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Atty. General.

Filed August 5, 1896.

ROUGH POOR COPY

At a Court of Claims held in the city of Washington on the 12th day of November, 1896, upon motion of Assistant Attorney-General Dodge, the application for appeal filed herein August 5, 1896, by the defendants was allowed.

BY THE COURT.

10 In the Court of Claims.

JOHN W. HERRON
vs.
THE UNITED STATES. } No. 18264.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 17th day of November, 1896.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed on cover:) Case No. 16448. Term No. 272. The United States, appellant, vs. John W. Herron. Court of Claims. Filed December 11th, 1896.

No. 272.

Brf. of Atty. Gen.l (Prad.) for Appellant.

Filed Oct. 19, 1897.

FILED.
OCT 19 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
JOHN W. HERRON, APPELLEE.
No. 272.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
JOHN W. HERRON, APPELLEE. } No. 272.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

Appellee was attorney for the United States for the southern district of Ohio, and as such defended the warden of the Ohio penitentiary against the prosecution of certain writs of habeas corpus sued out against him in the circuit court for the southern district of Ohio by certain United States prisoners confined in said penitentiary, upon which writs said prisoners were discharged.

Appellee was then ordered and directed by the Attorney-General to appeal said cases to the circuit court of appeals and to prepare and argue them in that court. Pursuant to these orders appellee prepared and argued said

cases before the circuit court of appeals, sitting at Louisville, Ky., outside the territorial lines of his district. Subsequently appellee presented to the Attorney-General duly certified accounts for his services in the circuit court and in the circuit court of appeals, which accounts were approved by the Attorney-General and forwarded to the Comptroller of the Treasury, who referred them to the Court of Claims, under the provisions of section 1063, Revised Statutes.

The Court of Claims rejected the account for services in the circuit court and allowed the account for services in the circuit court of appeals. Since the appellee has taken no appeal from the judgment, the only question involved in this appeal is the validity of the account for services in the court of appeals sitting outside appellee's district.

ASSIGNMENT OF ERRORS.

I.

The court erred in finding as a conclusion of law that said appellee, John W. Herron, was entitled to recover the sum of $150 on Finding IV.

II.

That the court erred in rendering judgment in favor of said appellee and against these appellants, being for the amount of services set out in Finding IV.

BRIEF OF ARGUMENT.

It seems so clear that the Attorney-General has no power to send a district attorney and the district attorney

BLEED. THROUGH POOR COPY

no power to go outside the territorial lines of his district *as a district attorney* that we do not think it necessary to argue the question.

If a district attorney be so ordered by the Attorney-General, it is not as a district attorney, but in some other capacity. If he be sent in some other capacity not incompatible with his duties as a district attorney, we concede that he is entitled to such compensation therefor as the Attorney-General may determine, provided the Attorney-General in so directing was acting within the scope of this authority.

We have contended in Garter's Case, submitted at this time, that it is the duty of the district attorney in whose district the court is sitting to represent the Government in all matters in the circuit court of appeals; or if it is not, then it is the duty of the Attorney-General and the officers of the Department of Justice.

In this view of the case this appellee could only have appeared in this circuit court of appeals as a special assistant to the Attorney-General or to the district attorney of the district in which the court was sitting.

Sections 363, 365, and 366, Revised Statutes, authorize the Attorney-General to employ attorneys or counselors to assist him or to assist district attorneys, but these must be regularly commissioned as special assistants to the Attorney-General or to a district attorney and shall take the oath required by law, none of which was done in this case. Claimant did not, then, earn any extra compensation as a special assistant attorney.

Section 365 prohibits compensation to any person besides the respective district attorneys and assistant district attorneys for services rendered the Government, "except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered and that the same could not be performed by the Attorney-General or Solicitor-General or by the officers of the Department of Justice or by the district attorneys."

No such certificate has been given in this case, and it would seem that no money should be paid for the service.

LOUIS A. PRADT,
Assistant Attorney-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,

vs.

JOHN W. HERRON,
Appellee.

No. 272.

Appeal from the Court of Claims.

Appellee's Brief of Argument.

Appellant's statement is not objected to, but the facts are more fully set forth in the Findings of Fact. (Trans. 3, 4, 5.) No opinion is filed in the case.

Appellee did not appeal from the judgment of the Court below, for the reason that owing to the amount claimed in his petition he was not within the statutory requirement.

It is submitted that where an appeal has been taken to the full amount of the judgment by either party the correctness of the whole judgment is at

issue. This is certainly equitable, where the Government alone has the right of an appeal. An appeal is allowed to the Government because, although but a small amount may be at issue in a special case a class of cases may be involved. This case was referred to the Court of Claims at the instance of the Comptroller of the Treasury for the reason that a class of cases was dependent upon the legal determination of the questions. It would appear but just to the Government as well as to the claimant, that all questions involved should be reviewed by this Court.

Two classes of cases are involved in this suit.

(1). *Services before the Circuit Court of Appeals.*

Appeals in two *habeas corpus* cases were taken in behalf of the United States, by direction of the Attorney-General from the Circuit Court for the Southern district of Ohio (of which Court Appellee was district attorney) to the Circuit Court of Appeals at Louisville, Kentucky.

It is contended by Appellee in *Garter's case*, submitted herewith and to which reference is made, that the judicial district of the Circuit Court of Appeals is separate and distinct from that of the district Court, although the geographical limits of one may be included within the other.

It is admitted by the Appellant that the services of Appellee were those of a special attorney rendered outside of the district of which he was district attorney.

It is further admitted that the services were not germane to his office as District-Attorney for the Southern district of Ohio.

It is also admitted that it was no part of Appellee's duties as district attorney to follow the cases to the Circuit Court of Appeals.

We respectfully differ from the Court below in their conclusion that the compensation is subject to adjustment in the Treasury Department as to his maximum compensation.

We agree with Appellant that the service was an independent employment and was that of a special attorney.

The service, not being germane to his duties as district attorney, should not be included in his maximum account.

The fees included in a district attorney's account are the fees which he received as district attorney. Fees to which he is entitled in an employment independent of his duties as district attorney have no place in his account as district attorney.

If this Court should determine that it is the duty of a district attorney to follow cases from his own district into the district of the Circuit Court of Appeals beyond the geographical limits of his own district, which we respectfully claim is not the law, then Appellee, rendering a special service, would be entitled to pay in an amount approved by the Attorney-General, which amount under the decision of this Court in *Smith's case* (159 U. S. R., 346) should be accounted for as district attorney.

But if, as we contend, and as admitted by Appellant, it was no part of his duty as district attorney for the Southern district of Ohio to prepare and argue a case before the Circuit Court of Appeals at Louisville, Ky., then his compensation would be

that of a special attorney, and should not be included in his maximum account.

The point made by Appellant is that Appellee was not duly appointed and commissioned under the provisions of 363, 365 and 366 R. S; that the Attorney-General did not certify that the services were actually rendered, etc., and that Appellee did not take the oath required by law.

It is submitted that the full requirements of the Statutes are complied with. District Attorneys are under the supervision and control of the Attorney-General, and in various ways are accountable to the Department of Justice. The Attorney-General can assign them duties.

Smith's case, supra. They are to that extent officers of the Department of Justice.

But if that position be waived, it cannot be disputed that Appellee was appointed to render the service, which was performed, and that the approval of his account for fees by the Attorney-General was virtually a certificate that all the requirements of law had been complied with.

Under any circumstances the requirement was simply directory. It comes within the rule, viz:

> If a statute is such that disregard of its provisions will constitute an irregularity, but one not necessarily fatal to acts done or proceedings had thereunder, it is said to be directory. *Ency. of Law* (23 Vol. pp. 155, 156); *Black's Law Dic. Torrey vs. Milbury* (21 Pickering, 64); *Cooleys Cons. Lim.*, 92.

(2) *Habeas corpus cases in Circuit Court.*

These cases were against the Warden of the Ohio

Penitentiary, a State institution. The Warden was a State, not a Federal, officer. Ordinarily the cases would have been heard in a State Court. But the prisioners were held under sentence by Federal Courts outside of the Southern District of Ohio.

The cases not arising in his district and against a State officer, it was not the duty of the district attorney to prosecute (?) the same. But they were cases in which the Attorney-General was at liberty to call upon the district attorney to defend the Warden.

The services were special. No fees for services of that character were provided for in the fee bill. The services were performed, not by virtue of his specific duties as district attorney, but by virtue of the order and direction of the Attorney-General.

The Attorney-General would have appointed any other district attorney or officer of the Department of Justice to attend to these cases.

The fees for special services were not included in fee bill, whether performed by district attorneys or by special counsel appointed by the Attorney-General are fixed by the Attorney-General. He not only approves of the service but also of the fee.

It is the Attorney-General who understands the character of the service, not the accounting officers. The duty rests on the Attorney:General to approve the service and fix the fee, not on the accounting officers. The service performed is a special serviee for which a special fee is allowable.

The Act of October 2, 1888 (25 S. L., 505, 545) since annually re-enacted, provides for fees of this character. The right to fix the fee is in the Attor-

ney-General, but he is frequently aided by the judges of the Court in which the service was rendered. In this case Judge Sage said in approving the account: "I think the charges not only reasonable but moderate."

W. W. DUDLEY,
L. T. MICHENER,
F. P. DEWEES,
Attorneys for Appellee.

No. 205.

Brief of Atty. Gen.l (Pradt) for Appellant.

Filed Oct. 27, 1897.

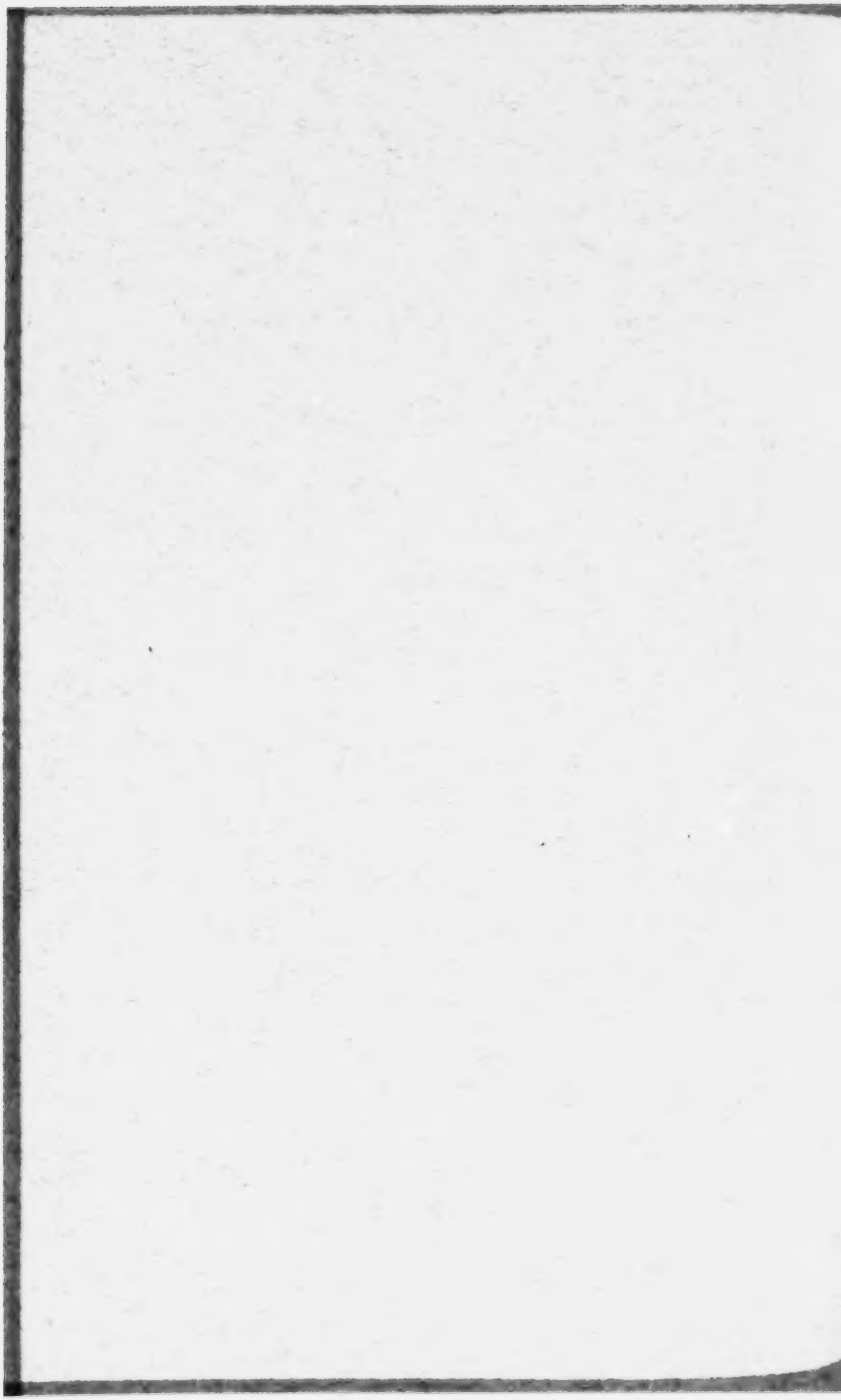
In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFF IN error,
v.
PATRICK HENRY WINSTON. } No. 205.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT.



BLEED. THROUGH POOR COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PATRICK HENRY WINSTON. } No. 205.

APPELLANT'S BRIEF.

STATEMENT.

This case was originally brought by appellee in the United States circuit court for the eastern division of the district of Washington, and judgment there going against them was by these appellants appealed to the circuit court of appeals for the ninth circuit, from which, judgment again going against them, they have appealed to this court.

The items described in the second and third findings of fact of the circuit court (Rec., pp. 15 and 16), having been disallowed by that court, and so much of the items in finding 7 (Rec., p. 17) as pertains to the defense of the case of *Ross* v. *Eells*, having been disallowed by the circuit court of appeals, are not at issue in this appeal.

ASSIGNMENT OF ERRORS.

The plaintiffs in error rely upon the following errors in the record:

I.

The circuit court of appeals erred in affirming the judgment and decision of the circuit court, holding and deciding that the defendant in error was entitled to recover the sum of $187.21 in addition to the amount paid him or any sum for services in the case of the United States against the steam tug *Pilot*. (VII, p. 45; Finding 4, p. 16, Rec.)

II.

The circuit court of appeals erred in affirming the judgment and decision of the circuit court, holding and deciding that the defendant in error was entitled to recover the sum of $310 as compensation for his services in the case of Dunsmuir against Bradshaw. (VIII, p. 45; Finding 6, p. 16, Rec.)

III.

The circuit court of appeals erred in affirming the judgment and decision of the circuit court, holding and deciding that the said defendant in error was entitled to recover for his services in the case of Gee Lee the sum of $250. (XVI, p. 46; Finding 5, p. 16, Rec.)

IV.

The circuit court of appeals erred in affirming the judgment and decision of the circuit court, holding and deciding that, upon the facts as found by the court, the

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defendant in error was entitled to recover any sum whatever or was entitled to any judgment whatever for his services in the case of the steam tug *Pilot*, in the case of Dunsmuir against Bradshaw, and in the case of Gee Lee.

V.

The circuit court of appeals erred in refusing to reverse the judgment and decision of the circuit court of the United States for the district of Washington, holding, that defendant in error was entitled to recover for his services in the aforesaid cases and in refusing to render judgment in that behalf for these plaintiffs in error.

ARGUMENT.

We concede, upon the authority of *United States* v. *Smith* (158 U. S. R., 346), that the judgment of the courts below allowing mileage, as set out in finding 7 (Rec., p. 17), is correct.

There are, therefore, left in issue in this case only those items pertaining to appellee's service as a district attorney in the circuit court of appeals sitting at a point outside the territorial lines of his district.

Briefs fully setting forth the position of the Government on this question have already been filed in this court in the cases of *United States* v. *Carter* and *United States* v. *Herron*, submitted at this time, and it is not deemed necessary in this case to add anything to what has been said there.

LOUIS A. PRADT,
Assistant Attorney-General.

○

Def's Brief.

Brief of Winston for D. C.

FILED
JAN 14 1898
JAMES H. McKENNEY

Filed December 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Plaintiff in Error,
vs.
PATRICK HENRY WINSTON,
Defendant in Error.

No. 105.

In Error to United States Circuit Court of Appeals for the Ninth District.

BRIEF OF DEFENDANT IN ERROR.

PATRICK H. WINSTON and
ALEX. H. WINSTON,
Attorneys for Defendant in Error.

Press of Pioneer Printing and Stationery Co., Spokane.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, Plaintiff in Error.	
vs.	No. 205.
PATRICK HENRY WINSTON, Defendant in Error.	

DEFENDANT IN ERROR'S BRIEF.

STATEMENT.

We desire to add nothing to plaintiff in error's statement except to say that the only matters now in controversy are as to the items of $250, $310 and $187.21, being a total of $747.21. These charges were for services in the circuit court of appeals sitting outside of defendant in error's district. It is conceded that the services were rendered by direction of the Attorney General. For these services defendant in error presented his bill to the United States. It

was approved and allowed by the Judge of the Circuit Court and by the then Attorney General of the United States, but the Treasury officials refused payment.

ARGUMENT.

Can defendant in error recover for services performed in the Circuit Court of Appeals at San Francisco, outside of his own district, when the services were rendered at the express direction and command of the Attorney General? We think the question should be answered in the affirmative.

The question is barren of authority for the reason that, prior to the time Mr. Winston became the victim of the ruling of the Treasury Department, accounts similar to his were paid without controversy.

We will therefore discuss the question upon principle.

I.

When defendant in error became the attorney of the Government, he accepted certain employment with statutory compensation therefor, and the laws governing his compensation applied to the duties then existing. The Circuit Court of Appeals was created

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after that time and it cannot be presumed that defendant in error accepted his office with any knowledge that he would be compelled to go to San Francisco on behalf of the Government. The well known rule would therefore obtain, that when, during the term of a public officer, additional and new duties are imposed upon him, he is entitled to extra compensation therefor. Therefore we take it to be the law that unless there is a clear, definite and emphatic statutory provision, applicable to this case, forbidding the payment of these fees, that good law, morals and justice demand that Mr. Winston should receive the money honestly earned. These United States cannot afford to appropriate the services of one of its citizens and then refuse to compensate him for them. The laborer is worthy of his hire even where the government is the employer.

II.

Again, even if the statutes (Sec. 365 R. S. and others) do forbid, as is contended by plaintiff in error, Mr. Winston being paid for his services, they were enacted prior to the law creating the Circuit Court of Appeals and cannot be held to apply to compensation for services rendered in that Court. There being no provision in the Act for compensation, the rule of

quantum meruit should prevail and as there is no dispute as to the value of his services he should recover, especially as the amount claimed is the amount allowed by the Attorney General.

A private employer under similar circumstances would be liable and the Government should not have any different rule applied to its contracts.

III.

But let us see what the statutes do say upon this question.

1st. Section 771 R. S. makes it the duty of every district attorney to prosecute in his district . . . all civil actions in which the United States are concerned.

This, therefore, made it the duty of Mr. Garter, the District Attorney of California, to appear and therefore it could not be Mr. Winston's to do so.

2nd. This being true, then the presumption arises that when commanded to perform these services by the Attorney General, the Government is liable to him for compensation therefor.

We contend that the amounts sought to be recovered are not fees but compensation, but if the

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Court holds they are fees, then Sec. 299 R. S. provides:

"All accounts of the United States District At-
"torneys for services rendered in cases instituted in
"the Courts of the United States, or of any State,
"when the United States is interested, but is not a
"party of record, or in cases instituted against the
"officers of the United States,or their deputies, or
"duly appointed agents for acts committed or omit-
"ted or suffered by them in the lawful discharge of
"their duties, shall be audited and allowed as in oth-
"er cases, assimilating the fees, as near as may be,
"to those provided by law *for similar services*
"in cases in which the United States is a party."

And the only services similar to those for which he seeks a recovery are rendered by attorneys specially retained on behalf of the Government in particular cases.

For such services the Attorney General is allowed to fix the amount of compensation. And in this manner his charges were correctly assimilated by virtue of Section 299.

IV.

It is suggested in the brief of plaintiff in error that Mr. Winston cannot recover because the Attorney General did not especially appoint him Assistant U. S. Attorney, nor did he certify that the District Attorney of California could not have attended to the cases.

However that may be, Mr. Winston was ordered to go to California. He did go. He could not know in what capacity he was ordered to go. He simply obeyed instructions. He could not do otherwise. And because of a failure of the Attorney General, over whom of course Mr. Winston had no control, to do certain acts it is contended that the Government, after accepting Mr. Winston's services, can now refuse to pay him. This is not the law.

V.

Briefly stating our position:

The Government has accepted Mr. Winston's services. It now says: Although we sent him to San Francisco, he cannot be paid as District Attorney because he should have disobeyed our command to go, and he cannot be paid as special counsel because the

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Attorney General failed to issue *after the services were rendered*, some technical certificate.

It is not justice and it surely cannot be the law that the Government can appropriate a citizen's property and refuse to pay for it, saying:

1st. We had no right to take his property and therefore we will keep it and will not pay for it.

2nd. We had a right to take his property; we did take it but we will not pay for it. Why? Not because it was not worth the price, not because of any default of the citizen, but solely because, after we had taken the property, our law officer omitted, or neglected, to his duty.

VI.

But there is still another ground why the judgment should be affirmed, and we believe a careful examination of the record will convince the Court of the soundness of our position. The points presented by plaintiffs in error cannot be considered by the Court because there is, and we say it with confidence, absolutely nothing in the record to show that the Attorney General did not follow whatever rule of law governs this, in allowing defendant in error's accounts.

The judgment of the lower court should be affirmed.

Respectfully submitted,

PATRICK H. WINSTON,

ALEX. M. WINSTON,

Attorneys for Defendant in Error.

UNITED STATES *v.* WINSTON.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 205. Submitted April 14, 1898. — Decided May 9, 1898.

The boundaries of his district are the limits of the official duties of a District Attorney, and if he is called upon by the Attorney General to do professional duty and services for the Government outside of those limits, and is allowed compensation therefor, he is entitled to receive the same, or to recover it in the Court of Claims if he has the certificate required by Rev. Stat. § 365, or if the court may, from all the evidence before it, fairly assume that the allowance was made in such a way as to secure to him the compensation to which he was entitled.

United States v. *Crosthwaite*, 168 U. S. 375, is adhered to, and the rule laid down in it is not qualified in the least by this decision.

THE defendant in error, who had been the District Attorney of the United States for the District of Washington from February 19, 1890, to May 30, 1893, brought this action in the Circuit Court to recover for special services as an attorney, rendered during that period, and there recovered a judgment. The Court of Appeals for the Ninth Circuit struck out one claim which had been allowed, but otherwise affirmed the judgment. 44 U. S. App. 401. Whereupon the United States sued out this writ of error.

The Government concedes that some of the items included in the judgment of the Court of Appeals are correct, and disputes only three. With respect to one of these disputed items, the Circuit Court made the following finding of fact:

"4. That during said term of office, to wit, about the month of April, 1892, plaintiff, at the request of the defendant, appeared in the Circuit Court of Appeals, Ninth Judicial Circuit, at San Francisco, in a case wherein the defendant was appellee, and the owner of the steam tug 'Pilot' was appellant, and as such attorney conducted the trial of said cause to its conclusion for the defendant. That the Attorney General of the United States allowed plaintiff for services in said cause the sum of $400, the law providing no specific com-

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pensation, and that said services were reasonably worth said sum. Of this sum defendant paid plaintiff $212.79, retaining the balance of $187.21 on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which these services were rendered and the money earned."

The other items are substantially similar, and it is, therefore, unnecessary to state the particular facts as to them.

Mr. Assistant Attorney General Pradt for the plaintiffs in error.

Mr. Patrick H. Winston and *Mr. Alexander M. Winston* for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

Is a District Attorney entitled to extra compensation for services rendered under the direction of the Attorney General in the conduct of a government case in the Court of Appeals? Section 767, Revised Statutes, provides that —

"There shall be appointed in each district, except in the middle district of Alabama and the northern district of Georgia and the western district of South Carolina, a person learned in the law to act as attorney of the United States in such district." . . .

Section 771 is —

"It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury."

These two sections define the place, character and extent of his duties. He is the District Attorney of the United States in the district. So far as locality is concerned, the boundaries of the district are the limits of duty. Within these boundaries he is to discharge all his official duties. Beyond them he is not called to go. Sections 773, 774 and 775 prescribe some details in respect to the duties enjoined by section 771, but do not add to their scope.

The suit in the Court of Appeals in which the plaintiff rendered services was not one then pending in his district. The sessions of that court were held in San Francisco, in the Northern District of California. But, wherever held, the Court of Appeals is not a court in or for any district. The act creating that court (26 Stat. 826, c. 517) does not create a court in or for a district, but one in and for each circuit. The relations of that court to a district are similar to those of this court. The Supreme Court is not a court in or of or for a district, but in and of and for the United States as a whole. The fact that this case was originally pending in the Circuit or District Court of the District of Washington does not make the Court of Appeals a court of that district when engaged in hearing the case on appeal. The case when it reached the Court of Appeals passed out of the courts of the district, just as fully as if appealed to this court. In other words, when a case is transferred to the Court of Appeals or to this court it passes beyond the limits within which a district attorney has jurisdiction and exercises his powers.

When a case in which the Government is interested comes to this court from any lower court it falls by the terms of the statute within the special care of the Attorney General. Section 359, Rev. Stat., provides:

"Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any

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court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Under this section the Attorney General may, in his discretion, make other arrangements for the management of such a case, but this discretion does not abridge the fact that the full responsibility and control are imposed directly upon him as the head of the Department of Justice. In the act creating the Court of Appeals there is no special direction to any attorney to represent the Government. Clerks and marshals were provided for, but the act is silent as to who shall represent the Government as its counsel. Undoubtedly, however, the matter falls within the general jurisdiction of the Department of Justice, and the Attorney General, by virtue of section 359 or sections 362 and 363, may either himself assume the management of all Government cases, or direct what officer shall have the control and management, or, if he deems it essential, employ special counsel. Whenever the Attorney General calls upon a district attorney to appear for the Government in a case pending in the Court of Appeals, he is not directing him in the discharge of his official duties as district attorney, but is employing him as special counsel. The duties so performed are not performed by him as district attorney, but by virtue of the special designation and employment by the Attorney General, and the compensation which he may receive is not a part of his compensation as district attorney or limited by the maximum prescribed therefor. It seems to us that this is the clear import of the statutes, and we have no difficulty in agreeing with the Court of Appeals in its opinion upon this question.

A more difficult matter is presented by these facts. Section 365, Revised Statutes, provides:

"No compensation shall hereafter be allowed to any person, besides the respective district attorneys, and assistant district attorneys, for services as an attorney or counsellor to the United States, or to any branch or department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such

services were actually rendered, and that the same could not be performed by the Attorney General or Solicitor General, or the officers of the Department of Justice, or by the district attorneys."

We held in *United States* v. *Crosthwaite*, 168 U. S. 375, that this section is controlling, and that "the certificate of the Attorney General prescribed therein, which even that officer cannot dispense with, is a prerequisite to the allowance of compensation." There is in this record no finding that this particular certificate was ever made, nor on the other hand is there anything to suggest that it was not made. It does appear affirmatively that the Attorney General allowed plaintiff for his services, the law providing no specific compensation, and that the services were reasonably worth the sum so allowed. We find no reference anywhere in the pleadings, the findings or the opinion of the Circuit Court, or in that of the Court of Appeals, to the particular terms of the certificate called for by this section. The language of its findings and opinion seems, however, to indicate that the Circuit Court found that proper certificates were given, and that everything necessary to entitle plaintiff to extra compensation had been performed, providing the case was one in which he could receive such compensation and in which the services rendered were not included within his duties as district attorney. We are strengthened in this conclusion by the fact that neither in the assignments of error made when the case was taken to the Court of Appeals nor in those filed when the case was brought here is there a suggestion that any certificate was lacking or deficient. It seems to us, therefore, that when it is expressly found that the Attorney General allowed this claim, and no showing is made of the particular form in which the allowance was made or certificate given, and no assignment of error raises a question as to the sufficiency of any certificate, we have a right to assume that the allowance was made in such a way as to secure to the plaintiff the compensation to which he was entitled. And so, although we adhere to the rule laid down in *United States* v. *Crosthwaite*, *supra*, and do not intend to qualify it in the least, we think a

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fair conclusion from this record is that the proper certificate was given.

The judgment of the Court of Appeals will, therefore, be

Affirmed.

UNITED STATES *v.* HERRON. Appeal from the Court of Claims. No. 272. Submitted with No. 205.

MR. JUSTICE BREWER delivered the opinion of the court. This case, like the preceding, is one for the recovery by a district attorney for services rendered in a Court of Appeals outside the limits of his district. But in this record there is a distinct finding by the Court of Claims that the certificate required by section 365, Revised Statutes, was not given. We are constrained, therefore, under *United States* v. *Crosthwaite*, 168 U. S. 375, to hold that the judgment cannot be sustained.

The order will be that the judgment be reversed and the case remanded to the Court of Claims for further proceedings.

Mr. Assistant Attorney General Pradt for appellants.

Mr. W. W. Dudley, Mr. L. T. Michener and *Mr. F. P. Dewees* for appellee.